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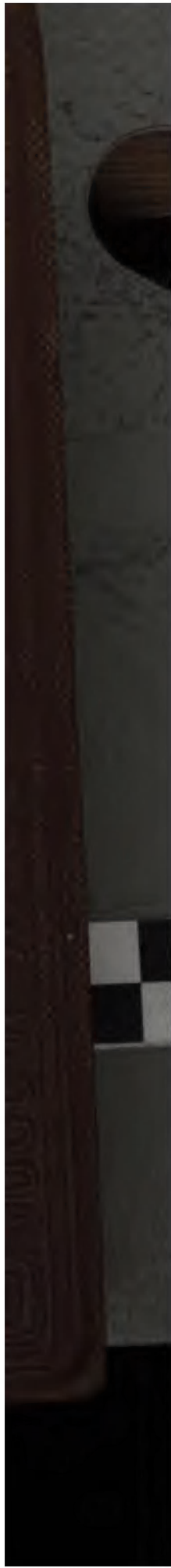
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PLUNKETT'S

AUSTRALIAN MAGISTRATE;

BY

WILLIAM HATTAM WILKINSON, ESQ.,

BARRISTER AT LAW.

ILLI IN VOS SÆVIANT, QUI NESCIUNT CUM QUO LABORE VERUM INVENIATUR, ET
QUAM DIFFICILE CAVEANTUR ERRORES.

SYDNEY:
J. J. MOORE, BOOKSELLER, GEORGE STREET,
[OPPOSITE ST. ANDREW'S CATHEDRAL.]

1860.

3-11-1944

FOOTWEAR PRINTED IN AUSTRALIA



TO
THE HONORABLE
SIR ALFRED STEPHEN, KNT.,
Chief Justice of New South Wales,
dec., dec.,

THIS WORK
IS (BY PERMISSION) MOST RESPECTFULLY INSCRIBED, BY

THE AUTHOR.

PREFACE.

I AT FIRST intended, with the sanction of Mr. PLUNKETT, to bring out a New Edition of the well-known Australian Law-Book, "*Plunkett's Magistrate*," and a glance over this work will show how much it is indebted to the original book, not only for some of its contents, but also for the form in which it has been written; but the more recent "*JUSTICES ACTS*," and other legislation, rendered a modification of the original plan necessary. In these alterations I consulted Mr. PLUNKETT;—and thus, although a New Edition of the late Attorney-General's old work, it is also under considerable obligations to other standard Law-Books. The *JUSTICES ACTS* are given in full; a Commentary on which—taken from SIR W. A'BECKETT's *Manual for the Magistrates of Victoria*, PALEY *On Convictions*, NICHOLS's *Justice*, and OKE's *Synopsis*—has been added. This Commentary, while containing the most ample instructions as to the duties of Magistrates, aims also at being a guide to the Profession in this branch of law. SUMMARIES of the principal Crimes and Misdemeanors have been taken from books of acknowledged authority, and in these Summaries the most recent Decisions have been collated and embodied.

The OFFENCES have been arranged in Tables, under their proper heads; those within the Summary Jurisdiction contain the offence in the words of the Statute. If the penalty is a Pecuniary Fine, the Mode of Recovery in each particular case is given; if it is Imprisonment, its Duration is given; in either case, the Section of the Act authorizing such penalty is referred to.

It is believed that this part of the work will take away the necessity for the present tedious reference to the Statute Book on every occasion when offenders are brought up under the Masters and Servants Act, the Police Act, the Publicans Act, the Vagrant Act, and such like.

In INDICTABLE OFFENCES, the Punishment is given, and also such reference to procedure or pleading as comes within the object of the work.

CORONERS, also, and CONSTABLES are instructed how to discharge properly their important duties ; and the Statutes under which they act are carefully collated.

The above is a sketch of the FIRST PART of the work. The SECOND PART contains all the Forms given by Jervis's Acts, together with some useful Supplemental Forms. A sufficient number of Forms of Convictions and Orders, of Informations, Warrants, &c., have been given to render the work a useful and accurate guide in all cases.

With the assistance of these Forms, it is hoped that Magistrates will be able to avoid those technical blunders which so frequently cause a miscarriage of justice.

The THIRD PART contains a Selection of the most important Judgments of the Supreme Court on Magistrates' cases during the last eight years. It is unnecessary to dilate on the value of this part of the work, or the importance of its being carefully studied.

A copious Index of the entire contents completes the work ; this will, by rendering it easy of reference, greatly add to its utility and convenience, and will also supply the place of an analytical index of the Statutes relating to Indictable Offences and Summary Convictions.

It will be found that the character of the book is essentially *practical*, and that questions of a theoretical or unusual nature are but slightly referred to. In only two instances have I taken the liberty of making theoretical suggestions ;—one, where attention has been drawn to the doubtful meaning of 11 and 12 Vict., c. 43, s. 19, and the probability, therefore, of the miscarriage of a large number of summary convictions (pp. 1, 243) ; the other, where reference has been made to the frequency of prosecutions for perjury, (p. 325).

This second question is one well deserving the immediate attention of the Legislature. It has been found that disappointed and unscrupulous litigants, either in the Civil or Criminal Courts, endeavour in these proceedings as well to obtain the privilege of a re-hearing, as the satisfaction of—it may be—gratifying animosity and malice. In both cases, the English Legislature has discovered a remedy, which can easily be adopted. It seems reasonable, and, I think, most desirable, that prosecutions so harassing and unsatisfactory should not be allowed, except with the permission of the presiding Judge or the Attorney-General.

I found it necessary, while the book was being printed, to omit the Statutory Forms given in the Schedules of the Pawnbroker, Publican, and Tenement Act.

I take this opportunity of thanking those friends who have assisted me in my undertaking by the loan of books,—many of them rare, and many costly. My best thanks are also due to many friends for valuable suggestions, among whom I may mention Mr. C. H. WALSH, of Goulburn, to whom I am indebted for the greater part of the article on Appeal, p. 7—10.

I now offer the result of much anxiety and toil with the hope that it will be useful,—and with the conviction that the more it is examined, the more will the difficulties of my task be understood, and my failings in its execution be excused.

W. H. WILKINSON.

Supreme Court, Sydney,

November 14th, 1860.

EXPLANATION OF ABBREVIATIONS.



SUMMARY CONVICTIONS.

1. **OFFENCE, STATUTE, AND NUMBER OF JUSTICES.**—The letter (S.) means that the offence following is within the Summary jurisdiction; the statute and section conferring such jurisdiction are next given; the number of Justices required to hear and convict follow next, and precede the offence, which is described in the words of the statute, with the legal exceptions and modifications in most cases, in an abridged form.

2. **PENALTY, &c., AND MODE OF ENFORCING.**—The letter (P.) means Punishment, which is followed by an abridged account of the penalty or other forfeiture imposed upon the offence, and the mode of enforcing payment; or, if the punishment is imprisonment in the first instance, the duration of such imprisonment is given. The section of the statute authorizing such punishment is added, when other than the section creating the offence.

INDICTABLE OFFENCES.

3. **CLASS OF OFFENCE AND STATUTE.**—The letter (F.) or (M.) means that the offence before which it is placed is a Felony or a Misdemeanor; if the offence is created by statute, such statute and section are given; if it is a common law offence, some recognized authority is generally added.

4. **AS TO BAIL IN INDICTABLE OFFENCES.**—The word "*disc.*," for "discretionary," before an offence, means that it is discretionary with the examining Magistrate to take bail for the accused before committal, and, where he commits, also discretionary whether he will certify his consent to bail being received by another. The word "*comp.*," for "compulsory," means that the examining Magistrate must take bail in these cases, if sufficient sureties be tendered before committal, and also that, if accused be committed, he must certify his consent to bail being received. (See sec. 23, p. 170 & p. 32).

5. **PUNISHMENT IN INDICTABLE OFFENCES.**—This is an abridged view of the punishment or other forfeiture imposed by law for the offence. In the case of transportation or hard labor on the roads, the maximum and minimum terms are stated shortly; thus, in title "Abduction," where the punishment is transportation for life, or for not less than 7 years, &c., "Tr. life—7 years," or "h. l. on roads 15—5 years," &c.; but where it is absolute and certain, it is stated according to the fact; and this is also the case in respect of the period of imprisonment.

6. **SUBSTITUTION OF PUNISHMENT OF MALE OFFENDERS.**—By 11 Vic., No. 34, an Act to substitute other punishments for transportation beyond the seas, contains the following provisions: Where any male offender shall be convicted of any offence punishable by law with transportation, the Court may either sentence the offender to transportation for life, or years, as by law provided, or, in lieu thereof, to be kept to hard labor on the roads or other public works of the Colony for such term, —not being more nor less in any case than the periods next mentioned, that is to say,—

Transportation for life	{ Hard labor on roads, &c., for not less than 7 years, nor more than 15 years
Transportation for 15 years, or any term not less than 7 years, and not exceeding 15 years	{ H. l. on roads, &c., for not less than 5 years, nor more than 10 years
Transportation for 7 years.....	{ H. l. on roads, &c., for not less than 3 years, nor more than 5 years

and upon all convictions for perjury, or for any felony attended with violence to the person, or committed by the offender when armed with any offensive weapon,

&c., or by means of any threat, or by putting in fear, the Court may direct that the offender, whether sentenced to hard labor or to transportation, be kept to hard labor in irons for not exceeding in any case the first 3 years of his sentence.

Section 2 provides for the commutation of capital sentence.

15 Vic., No. 5, s. 1, empowers the Court, in the case of any offence punishable by law with imprisonment with hard labor, to sentence the offender to such imprisonment for such term as by law provided, or, in lieu thereof, to award and direct that he be kept to hard labor on the roads or other public works for such term, not being more in any case than the term of imprisonment fixed by law for such offence. See pp. 353, 141.

7. SUBSTITUTION OF PUNISHMENT OF FEMALE OFFENDERS.—The 11 Vic., No. 55—an Act to substitute, in respect of female offenders, other punishments in lieu of transportation—provides that the Court may sentence the offender, by way of substitution for transportation, to be imprisoned in any gaol or house of correction for such term as the said Court shall think fit, not being more nor less in any case than the periods next mentioned; thus,—

Transportation for life	} Imprisonment for not less than 3 years, nor more than 7 years
Transportation for 15 years, or any term under 15, and more than 7 years	} Imprisonment for not less than 2 years, nor more than 5 years
Transportation for 7 years.....	} Imprisonment for not less than 1 year, nor more than 3 years

and the Court may sentence the offender to light labor or hard labor, as the Court shall think fit, and also direct her to be kept in solitary confinement for any portion of such imprisonment, not exceeding in the whole 3 calendar months in any one year, and not exceeding 14 days at any one time: provided that nothing in this Act shall take away, alter, or abridge any power to award other and different sentences.

For an offence at common law, the term is not limited. It is also shown whether the imprisonment may be with hard labor, solitary confinement, and whipping, and which of them.

In some cases, hard labor is authorized by s. 28 of 16 Vic., No. 18, (*note A*); but with respect to solitary confinement, 1 Vic., c. 90, s. 5, enacts "That it shall not be lawful for any Court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year."

EXPLANATION OF VERBAL ABBREVIATIONS.

cal. m..... calendar months.	impr..... imprisonment.
exc. exceeding.	s. section.
h. l. hard labour.	No..... number.
l. l. light labour.	yrs. years.
s. c. solitary confinement.	comp..... compulsory.
H. M.'s .. Her Majesty's.	disc. discretionary.

(A) By this section it is enacted, that "whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor, that is to say,—any cheat or fraud punishable at common law;—any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime; or to obstruct, prevent, pervert, or defeat the course of public justice;—any escape or rescue from lawful custody on a criminal charge;—any public and indecent exposure of the person;—any indecent assault, or any assault occasioning actual bodily harm;—any attempt to have carnal knowledge of a girl under 14 years of age;—any public selling, or exposing for public sale, or to public view, of any obscene book, print, picture, or other indecent exhibition,—it shall be lawful for the Court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labor during the whole or any part of such term of imprisonment."

ERRATA.

Page 47, after line 8, insert "Broad wheels; see 'Tolls.' "

Page 64, line 24, insert "s. 9," after No. 6.

Page 110, line 34, last word but four, for "deed," read "written document."

Page 234, line 16, insert 2 before 5.

Page 285, line 9, insert "such" between the word "any" and the word "beast."

Page 493, strike out lines 25 and 26, beginning, "and the evidence," to "in the presence," and substitute "and the evidence on oath of the said —, and the other witnesses called before us, given in the presence"

Same page, line 30, after the words "illegitimate male child," insert "and that he has, without reasonable cause, deserted (or left without adequate means of support) the said child."

Same page, strike out in lines 32, 33, 34, words commencing "into the hands" to "for the time being," and substitute for them, "into the hands of the Clerk of Petty Sessions at —, (or as the case may be)."

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THE

AUSTRALIAN MAGISTRATE.

PART I.

—o—

ABATTOIR.

S. 19 Vic., No. 11, s. 3. [*One Justice*].—(1) Every person driving, or causing to be driven, any cattle (*i.e.* bull, cow, ox, heifer, or steer, except milch cows or working cattle), into or along the road from the Parramatta Road to the Public Abattoir on Glebe Island, at any other time than between the hours of six o'clock in the evening and eight o'clock in the morning.

P. Fine, not exc. 20s. a head; to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22. (A) See *post*, "Justices, Recovery of Fines," and *ex parte* Cockburn, *post*, Part III.

ABDUCTION.

F. 9 G. IV., c. 31, s. 19. *Bail disc.*—(1) Of a woman on account of her fortune; and every person counselling, aiding, or abetting offender.

P. Tr. life—7 yrs.; or impr. not exc. 4 yrs., h. l.; or (*if male*) h. l. on roads 15—5 yrs; (*if female*), impr. 7—2 yrs., h. l. and s. c.

(A) *Recovery of Penalties.*—Where the statute, directing the fine, does not also authorize its recovery either by distress or imprisonment, it seems that there is no effectual procedure prescribed by Jervis's Act, (11 and 12 Vic., c. 43), except, perhaps, the general power of distress authorized by section 19; and, if the distress is ineffectual, no ulterior measure by imprisonment is lawful. The Chief Justice, in his elaborate judgment *ex parte* Cockburn, (delivered July, 1857,—the case is given at large *post*, Part III.), pointed out this important difficulty, and, it is believed, suggested to the then Attorney-General the necessity of immediately introducing an Act to supplement the defect. At the instance of the Editor, an Act extending the operation of s. 22 of Jervis's Act, (similar to 21 and 22 Vic., c. 73, s. 5), will be introduced into Parliament during its present session, and will, it is to be hoped, become law before this book is issued from the press. See the Imperial Act given in full, "Justices, Recovery of Fines, &c.," *post*. The new Act will also contain a section repealing the excluding limitation of s. 35 of 11 & 12 Vic., c. 43. The course of procedure will then in all cases be uniform.

(*Evidence: Prove 1. That the woman had such interest in real or personal property as is specified in the statute: 2. That she was taken away against her will: 3. That the taking was from motives of lucre*).

M. Ib., s. 20. (b) *Bail disc.*—(2) Of an unmarried girl under the age of 16 years, out of the possession and against the will of her father or mother, or of any other person having the lawful charge of her.

P. Fine or impr., or both.

(*Evidence: Prove 1. The taking against the will, &c.: 2. The age of the girl: 3. That she is unmarried*).

ABORIGINAL NATIVES.

The Aboriginal Natives are as much under the protection of, and are as amenable to, the laws of the country as the rest of Her Majesty's subjects. (*Plunkett's A. M.*) (But see case of Aboriginal, Part III.)

By 13 Vic., No. 29, s. 47, (the Publicans' Act), the sale or gift of intoxicating liquors to them is made penal. (See "Publican").

By 6 & 7 Vic., c. 22, authority is given to the Colonial Legislature to make laws for the admission in any Court or before Magistrates of the evidence of aboriginal natives.

ABORTION.

F. 1 Vic., c. 85, ss. 6—8. (c) *Bail disc.*—(1) Administering to, or causing to be taken by, a woman any poison or other noxious thing to procure; or (2) Using any instrument or other means with the like intent.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 15—7 yrs.; (*if female*), impr. 7—3 yrs., h. l. and s. c.

F. Ib., s. 7. *Bail disc.*—(3) Accessory after the fact.

P. Impr. not exc. 2 yrs.

ACCESSORIES.

Accessories before the Fact.—By the 13 Vic., No. 7, s. 1, accessories before the fact to felonies are made punishable as principals, as in treason and misdemeanors. The section enacts, "from and after the passing of this Act, (20th July, 1849), if any person shall become an accessory before the fact to any felony, whether the same be a felony at Common Law, or by virtue of any statute or statutes made or to be made, such

(B) It was formerly considered doubtful, (*R. v. Meadow*, 1 C. & R., 399), but it is now decided that it is immaterial whether the girl consents or not; and that the taking need not be by force, actual or constructive. (*R. v. Mankletow*, 22 L. J., M. C. 115).

(c) The prisoner was convicted on an indictment under this statute, in a case where it appeared that C. being pregnant, applied to prisoner to get something to produce miscarriage, and that he did procure a drug, which was given by him to C., and taken by her with intent to procure and did procure miscarriage; but the taking by C. was not in his presence. It was held that the conviction was right, as there was "a causing to be taken" within the meaning of the statute. (*R. v. Wilson*, 26 L. J., M. C. 18). The offence is the intent to procure miscarriage, and this being proved, the prisoner may be convicted, whether the woman is or is not pregnant. (*R. v. Goodchild*, 2 C. & K., 293).

person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."

After the Fact].—As to accessories *after* the fact, there was no general statute which allowed of their being tried before the principal offender was convicted; but sec. 2 of 13 Vic., No. 7, allows them to be "indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or to be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and may thereupon be punished in like manner as an accessory after the fact to the same felony, if convicted as an accessory, may be punished; and the offence of such person, howsoever indicted, may be inquired of, tried, determined, and punished by any Court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall become an accessory had been committed at the same place as the principal felony."

By sec. 15 of 16 Vic., No. 18, it is provided that any number of accessories or receivers may be charged with substantive felonies in the same information, notwithstanding the principal felon shall not be included in the same information, or shall not be in custody or amenable to justice.

F. 7 G. IV., c. 64, s. 9, and 13 Vic., No. 7, s. 1. (D) Bail disc.—(1) Before the fact to any felony.

P. The same as principal.

F. 7 & 8 G. IV., c. 28, s. 8, and 13 Vic., No. 7, s. 2. Bail disc.—(2) After the fact to any felony, not specially provided for (not being receivers).

P. Tr. 7 yrs., or impr. not exc. 2 yrs., h. l., s. c., and w.; or (if male) h. l. on roads 5—3 yrs.; (if female), impr. 3—1 yr., h. l. and s. c.

N.B. As to accessories after the fact in any particular case, see the conclusion of the titles.

ACCUSING OF CRIME.

F. 1 Vic., c. 87, s. 4, and 10 & 11 Vic., c. 66, s. 2, (adopted by 14 Vic., No. 16.)—(1) Accusing, or threatening to accuse, another of a crime, with a view of extorting money, &c.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or (if male) h. l. on roads 15—7 yrs.

N.B. If the threat was by letter, see "Letter-Threatening," post; if money was extorted, see "Sodomy," post.

(D) An accessory *before* the fact is one who, *being absent* at the time of felony committed, procures, commands, or counsels another to commit a crime.

An accessory *after* the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, and assists the felon.

In all felonies there may be accessories; but in misdemeanors and treason there are no accessories.

ADMIRALTY.

46 G. III., c. 54; 9 G. IV., c. 83, s. 4; 2 W. IV., c. 51; 11 Vic., No. 46; 6 & 7 Vic., c. 94; 13 Vic., No. 28; and 12 & 13 Vic., c. 96.—The following abstract of 11 & 12 Vic., c. 96, may be useful:—

Persons charged in the colony with offences committed on sea.—S. 1. All persons within any colony charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or like offence, of what nature or kind whatsoever, committed upon the sea, or in any haven, river, creek, or place where the Admiral, &c., has power, authority, or jurisdiction; or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to any colony,—then and in every such case all Magistrates, Justices of the Peace, public prosecutors, &c., shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences; and they are hereby respectively authorized, &c., to institute and carry on all such proceedings for the bringing of such persons so charged as aforesaid to trial, &c., as by the law of such colony would and ought to have been had and exercised, &c., by them respectively, if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of criminal justice of such colony.

By s. 2, persons convicted of such offences shall suffer the like punishments as in England. (See Act, and *quære* as to words “by any law, &c., now in force”).

By s. 3, where any person shall die in any colony of any stroke, poisoning, or hurt, such person having been feloniously stricken, &c., upon the sea, or in any haven, &c., where the Admiral, &c., has power, &c., or in any place out of such colony;—every offence committed in any such case, whether murder or manslaughter, or being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in such colony in the same way in all respects as if such offence had been committed within the colony; and if any person in any colony shall be charged with any such offence as aforesaid in respect of the death of any person who, having been feloniously stricken, &c., shall have died of such stroke, &c., upon the sea, or in any haven, &c., where the Admiral has power, &c., such offence shall be held for the purpose of this Act to have been wholly committed upon the sea.

By Jervis's Act, the Magistrates have jurisdiction in all cases of indictable offences committed on the high seas, or in any place within the jurisdiction of the Admiralty, or for offences on land beyond the seas, for which an indictment may legally be preferred. (S. 1 of 11 & 12 Vic., c. 42. Oke S., p. 12).

By s. 21 of the Imperial Act for the Amendment of the Merchant Shipping Act, 18 & 19 Vic., c. 91, a British subject charged with an offence committed on board any British ship on the high seas, or in any foreign port or harbour, or any person not a British subject charged with

an offence committed on board a British ship on the high seas, and found within Her Majesty's dominions, may be there tried.

ADULTERATION.

See "Publican," (19 Vic., No. 19), "Brewer," and "Baker."

AFFRAY.

M. at Com. Law. Bail comp.—(1) Two or more fighting in some public place, to the terror of the people. (E)

P. Fine or impr., or both.

AGENTS.

M. 7 & 8 G. IV., c. 29, ss. 49, 51. Bail comp.—(1) Embezzlement by banker, merchant, broker, attorney, or other agent, of money, securities, or proceeds, or of stock, &c., contrary to directions in writing;—or by factors or agents entrusted with goods or merchandise for sale, or bill of lading, &c. (As to exceptions to these offences see ss. 50, 52).

P. Tr. 14—7 yrs.; or fine or impr., with h. l. and s. c., or both; or (if male) h. l. on roads 10—5 yrs.; (if female), impr. 5—2 yrs., h. l. and s. c.

AIDERS.

S. 11 & 12 Vic., c. 43, s. 5. (See the section in Justices' Act).—(1) Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction.

P. Liable to the same forfeiture and punishment as the principal offender.

AMENDMENT.—See "JUSTICES."

ALIEN.—See "NATURALIZATION."

ANIMALS—CRUELTY TO.

S. 14 Vic., No. 40, s. 1. [One Justice or two Justices, s. 10].—(1) Any person cruelly beating, ill-treating, over-driving, or "over-riding," (s. 21), abusing, or torturing;—or causing or procuring to be cruelly beaten, &c., any animal. (F) and (G)

(E) The parties may, instead of being committed for trial for the affray or assault, or an indictment being prepared against them in the first instance, be bound over to keep the peace. (See title "Prize Fights," *post*).

(F) *Meaning of "animal" and "over-drive"*.—The word "animal" shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal; and the word "over-drive" shall also signify "over-ride." (S. 21).

(G) *Time of laying Information*.—Within one cal. m. after the cause of offence shall arise. (S. 6).

Apprehension of Offenders, Detention of Vehicle.—S. 5 authorizes the apprehension of offenders without warrant by any constable, either upon his own view of the offence, or upon the complaint or information of any other person who shall declare his name and place of abode to the constable, and he shall then be taken before the Justice, who shall examine the witnesses, &c. S. 11.—Vehicles or animals taken into custody by any constable, with offenders, may be detained and deposited for safe custody, as a security for payment of penalty to which the offender or the owner may become liable, and Justice may order the same to be sold.

P. Fine not exc. £5; in default of payment whereof, together with costs, immediately or within the time appointed, impr., with or without h. l., for not exc. 2 cal. m., unless sooner paid, (s. 10).—Or, if before two Justices, instead of pecuniary penalty, at their discretion, impr., with or without h. l., for not exc. 3 cal. m. (s. 10). (H)

S. *Id.*, (s. 3). [*One Justice or two Justices*].—(2) *Damaging animal, person, or property*.—Any person cruelly beating, ill-treating, over-driving, abusing, or torturing any animal, doing any damage or injury to such animal,—or thereby causing any damage or injury to any person,—or to any property.

P. Fine not exc. £10, by way of compensation; in default, impr. &c., as in offence 1.

MEM.—*This punishment is not to affect the punishment the offender may be liable to for the beating, &c., of the animal, as offence 1, nor to prevent any proceeding by action.*

S. *Id.*, (s. 2). [*One Justice or two, s. 10.*].—(3) *Keeping cockpit, &c.*—Keeping,—or using,—or acting in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether domestic or wild,—or permitting or suffering any place to be so used.

P. Fine not exc. £5 for every day on which offender shall so keep, &c., such place; in default of payment, impr. as in offence 1.

MEM.—*Every person receiving money for admission to be deemed the keeper.*

S. *Id.*, (s. 4). [*One or two Justices*].—(4) *Improperly conveying animals.*—Conveying or carrying,—or causing to be conveyed or carried,—in or upon any vehicle any animal in such a manner or position as to subject such animal to unnecessary pain or suffering.

P. Fine not exc. £5; in default, impr. as in offence 1.

S., *Id.* (s. 12). [*One or two Justices*].—(5) *Obstructing constable.*—At any time or in any manner unlawfully obstructing, hindering, molesting, or assaulting any constable while in the exercise of any power or authority under or by virtue of this Act.

P. Not exc. £5; in default, impr. &c., as in offence 1.

S. *Id.*, (s. 14). [*One or two Justices*].—(6) *Proprietor or owner of stage carriage, cart, &c., failing to produce his driver without satisfactory excuse.* (1)

(H) *Summons, Conviction, Witnesses*.—The Form (see *post*, Part II.) of conviction given by this statute must be used. (See 11 & 12 Vic., c. 43, s. 17). The service of the summons is as usual, and a warrant may be granted without a summons, (s. 8). S. 9 authorizes any Justice to summon witness; and, after tender of his reasonable expenses in that behalf, if such witness neglect or refuse to attend at time and place mentioned in the summons, then, upon proof of personal service of summons, and such tender of expenses, such Justice may issue a warrant and commit any witness appearing or being brought before him who shall refuse to give evidence, for not exc. 21 days, or until such witness shall sooner be examined and give evidence. (See 11 & 12 Vic., c. 43, s. 7; and "Witness," *post*).

(1) *Appeal*.—S. 17. In all cases where the sum adjudged to be paid shall exceed £2, and in all cases where imprisonment shall be adjudged, any person may

P. Fine 40s., and so from time to time as often as summoned, until he produce the driver; in default of payment, impr. as in offence 1.

S. *Id.*, s. 2. [*One or two Justices*].—(7) In any manner encouraging, aiding, or assisting at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal, in any place kept or used for the purpose. (κ)

P. Fine not exc. £5 for every such offence; in default of payment, impr. as in offence 1.

APPEAL.

An appeal signifies a complaint to a superior tribunal of the erroneous judgment of an inferior one, and is in the nature of a writ of error brought in order to avoid or quash such judgment. The only application of this remedy with which we have any concern here, is in reference to its use in bringing the orders or convictions of Justices acting out of Sessions to the review of the General or Quarter Sessions. (Dickinson, Q. S., 614).

The right of appeal exists only when given by express enactment, and cannot be extended to cases not distinctly enumerated. (Paley, 296).

Some Statutes contain a provision making it obligatory on the convicting Justice, at the time of the conviction, to make known to the party his right to appeal. In every case it is highly desirable the party should be so informed by the Justice.

When an appeal is allowed by Statute, it is usually upon certain conditions,—either that a notice be given to the Justice whose act is appealed from, and a recognizance entered into to prosecute the appeal, (l) or to deposit the amount of the penalty and costs.

If no mode of proceeding to appeal is provided by the Act under which the conviction has been had, the 5th W. IV., No. 22, s. 3, regulates the mode in this Colony. (m)

appeal to the next Court of General Quarter Sessions, holden not less than 14 days after the day of conviction, giving to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions; and also either remaining in custody until the sessions, or entering into a recognizance, with two sufficient sureties, before a Justice, conditioned personally to appear, &c. The late case of *R. v. JJ. of Warwickshire*, (25 L. J. M. C., 119), decided that where Statutes give appeal, "where the sum adjudged to be paid shall exceed" a stated amount (as here), it means the penalty only, and does not include the costs. In this case the appeal did not lie, because the penalty was only 2s. 6d., although the costs and fine were £2 10s. As to production of servants by owners, see s. 24.

(κ) See *Clarke v. Hague* (29 L. J. M. C., 105), and *post*, p. 487.

(l) In *R. v. Aston*, (19 L. J. M. C., 236; *In re W. Blues*, 24 L. J. M. C., 138), the word "immediately," in reference to the time of entering into the recognizance, was held not to mean at the time of the conviction, but the prisoner is entitled to be discharged if he apply to have the recognizances taken promptly after the conviction, regard being had to all the circumstances of the case. (See Paley, 305).

(m) S. 3 enacts, "That in all cases in which any person shall be or is now entitled to appeal from any judgment or conviction of any Justice or Justices under or by virtue of any such Act as aforesaid, (and no other mode of proceeding shall have been or shall be in that behalf provided), then, if such person (in case a pecuniary penalty shall have been awarded), shall pay into the hands of the convicting Justice, or one of the convicting Justices, (as the case may be), the full amount of such penalty, together with the assessed costs and charges, within one week next after such conviction, or (in case no pecuniary penalty shall have been awarded) shall, within one week next after the date or time of such judg-

Payment to the Justice of penalty and costs within one week after the conviction, or, in case where no pecuniary penalty shall have been awarded, entering into a *bond* to the convicting Justice within the like period, are the only conditions imposed by this Act. It differs from almost every other enactment on the subject, in requiring the security to be by *bond*, and not *recognizance*. The Court of Quarter Sessions has refused to hear appeals (under this Act) where the security entered into has been a *recognizance*, and not a *bond*. Mr. Nichol's book is incorrect in this respect.

The following is a Form of bond :—

Know all men by these presents, That We, A. B., (*appellant*), of —, C. D., of —, and E. F., (*sureties*), of —, in the Colony of New South Wales, are held firmly bound to M. N. and X. Y., Justices of the Peace, &c., — their executors, administrators, and assigns, to the use of Her Majesty the Queen, her heirs and successors, in the sum of — pounds of lawful money to be paid to the said M. N. and X. Y., their executors, administrators, and assigns, to the use of Her said Majesty, her heirs and successors, to which payment well and truly to be made we bind ourselves and each of us, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this — day of —, one thousand eight hundred and sixty—

Whereas, by a certain conviction [*or order*] [*as the case may be*] under the hands and seals of the said M. N. and X. Y., —, the said A. B. hath been convicted for that he the said A. B. (*state offence*). And whereas the said A. B., —, hath declared his intention to appeal against the said conviction :

Now the condition of the above-written obligation is such, that if the above bounden A. B. shall at the next General Quarter Sessions to be holden at —, in the said Colony, prosecute with effect an appeal against the said conviction, and shall abide the event of the same appeal, and pay the full amount of all such costs as shall or may on such appeal be awarded against him, then this obligation to be void, or else to remain in full force and virtue. Signed, sealed, and delivered in the presence of

A. B., (L.S.)
C. D., (L.S.)
E. F., (L.S.)

The appellant should, in every case, carefully examine the Act under which the conviction has been made, and by which the right of appeal is

ment or conviction had, enter into a bond to the convicting Justice or Justices, to the use of His Majesty, his heirs, and successors, with two sufficient sureties, to be approved by such convicting Justice or Justices, conditioned to *prosecute such appeal with effect, and to abide the event of the same appeal, and to pay the full amount of all such costs as shall or may on such appeal be awarded against the appealing party*, then it shall be lawful for such person to appeal from such judgment or conviction to the next General Quarter Sessions, unless such Sessions shall be held within six days next ensuing, and in that case to the General Quarter Sessions next but one afterwards : Provided that the matter of every such appeal shall be heard and determined by the Justices assembled and meeting at a Court or adjourned Court of General Quarter Sessions, holden at such one of the places which shall or may be appointed for the holding of General Quarter Sessions as shall happen to be the place (or nearest to the place) where the judgment or conviction appealed from shall have been had ; and the Justices at such Sessions so assembled shall hear and thereupon finally determine the matter of every such appeal in a summary way, and their judgment thereon shall be final and conclusive, to all intents and purposes, nor shall any writ of *certiorari* be afterwards allowed ; and such Justices of such Sessions so assembled are upon such appeal hereby authorized to award in all cases such costs as to them shall appear proper to be paid to either party, not exceeding the sum of ten pounds in the whole on any one appeal ; and in case the appeal shall be allowed, and the conviction or judgment appealed from be quashed, then (in cases where a pecuniary penalty was awarded) the whole amount of such penalty and of the costs and charges aforesaid shall be forthwith, on demand, returned to the party so appealing."

given, on account of the great variety of the statutory conditions, and as the Sessions have no jurisdiction to entertain it unless the conditions have been complied with. (Dickinson, Q. S., 639).

The convicting Justice should fix the sum for which the bond should be given, and also be satisfied of the sufficiency of the sureties.

If the Statute requires the appellant to enter into a recognizance, then a recognizance, and not a bond, should be entered into.

The following form of recognizance can be used :—

[*Proceed as in the Form of Recognizance, Ch. II., No. 12, (E.), post, p. 454, stating the condition thus*] :—Whereas by a certain conviction under the hand and seal of A. B., one of Her Majesty's Justices of the Peace in and for the Colony of —, the said — is convicted for that the said —, on, &c., (*stating the offence*), and whereas the said — hath given due notice unto — of his intention to appeal against the said conviction :

Now the condition of this recognizance is such, that if the above bounden — shall personally appear at the next General Quarter Sessions of the Peace to be holden at —, in the said Colony, and shall then and there try such appeal, and abide the judgment of the said Court of General Quarter Sessions thereupon, and pay such costs as shall be by the said Court awarded, then this recognizance is to be void.

Taken and acknowledged before me,

L. M., J. P.

The Justice should cause the conviction or order to be prepared and forwarded with the appeal to the Clerk of Peace for the district; any neglect in this behalf may defeat the success of the appeal, and therefore render the Magistrate liable in an action for special damages. (1 T.R., 414).

As the proceeding at the Sessions is a re-hearing of the case, it is necessary that the witnesses on whose evidence each party relies should be in attendance at the Quarter Sessions, as the depositions taken before the Justices are not admissible in evidence there. Subpœnas, to compel the attendance of witnesses, are issued by the Clerk of the Peace.

Notice of appeal be given.—It is usually required by the Statute authorizing the appeal, that the defendant give due notice of his intention to appeal. In all cases notice should be served on the prosecutor and the convicting Justices. The following is a Form of Notice :—

To wit. } To —, of —, in the Colony of —.
This is to give you [*or, and each and every of you*] notice, that I, —, do intend, at the next General Quarter Sessions of the Peace to be holden at —, in the Colony of —, to appeal against a certain conviction of me, the said —, by —, Esquire, one of Her Majesty's Justices of the Peace in and for the Colony of —, for having, as is therein and thereby alleged, on —, at —, (*stating the conviction, as the case may be, a copy of which should be procured from the Magistrate's Clerk for that purpose*), and ordered to pay a penalty of —, together with the sum of — for costs.

Dated this — day of —, in the year of our Lord one thousand eight hundred and —.
J. S. (*Appellant's signature*).

A duplicate copy of this notice should be kept for proof of the service at the trial, and should be endorsed with a memorandum of the service.

The notice required is either a reasonable notice, without specifying any length of time, or it is directed to be given a certain number of days after the conviction and before the Sessions; unless the Statute expressly require the notice to be in writing, it may be verbal, (*R. v. J.J. of Salop, 4 B. & A., 626*). Under the various titles, the clause of the Statute

giving the power of appeal, and regulating the mode of doing so, is given in this work. Where three Justices have convicted, notice of appeal must be given to each. (*R. v. JJ. of Bedfordshire*, 11 A. & E., 134).

The appellant should enter the appeal for hearing with the Clerk of the Peace. It has been lately ordered by the Chairman of Quarter Sessions for the Metropolitan district, Mr. Holroyd, that this be done on or before the Saturday next preceding the Sittings.

Practice.—Appeals are generally called on for hearing at the conclusion of the Criminal business of the Quarter Sessions; in each case the Clerk of the Peace reads the conviction; the appellant is bound, if required, to satisfy the Court, *in limine*, that the right of appeal exists, and that he has complied with the conditions on which the right of appeal is given. Afterwards the appellant may object to any illegality appearing on the face of the conviction, and, if such objection be sustained, the Court must quash the conviction; but, if the conviction be sustained, the respondent proceeds to support the conviction.

Fresh Evidence may be adduced on the hearing of the Appeal.—On the trial against a conviction, either party may adduce fresh evidence in addition to or in place of that which was originally offered at the Police Office, so that such additional evidence be within the terms of the notice; and the informant in his new character of respondent at the Quarter Sessions, will have to begin and prove his case *de novo*, as he did in the first instance, upon the hearing of the information, and should be prepared accordingly. The trial of the appeal is thus, in fact, a rehearing of the merits. (See Dickenson's Q. S.)

The convicting Justice should not sit as a Justice on the hearing of the appeal at Quarter Sessions.

Section 27 of 11 and 12 Vic., c. 43, (page 207), provides that, after an appeal decided for respondent, the conviction is to be enforced, and the costs, if either party to have them, to be paid to the Clerk of the Peace;—that Justices are to issue a distress warrant for the same, and, in default, commit. The statutory forms will be found, Part II., Chap. II., p. 482. (N)

Of the mode of proceeding to obtain Mandamus or Certiorari.—It is the less necessary to notice further the practical means to be pursued in order to obtain the *mandamus* or *certiorari*, on account of the unfrequency with which summary convictions will now be brought under the notice of the Judges, arising, doubtless, from the clause which is usually inserted in modern Statutes relating to the summary jurisdiction, expressly taking away the power to remove the proceedings by *certiorari* or otherwise into any of the superior Courts, and the more easy remedy provided in this Colony by the *Statutory Prohibition*; (see Justices, No. 4, *post*, p. 259). The Supreme Court will not, upon the return of the writ of *certiorari*, re-hear the *merits*, although in certain cases, and under peculiar circumstances, the Judges in England have received affi-

(N) The section (s. 27) establishes one general rule and uniform practice as to appeals against summary convictions and orders, and to those cases only, (see *ex parte Huntley*, 23 L. J. M. C., 106), and impliedly repeals the provisions of any previous Statute in which there is a different enactment as to the costs of appeal. (*R. v. Hellier*, 17 Q. B., 229).

debits from both sides, in order to procure information with respect to collateral extrinsic proceedings. (*R. v. Jukes*, 8 T. R., 542).

Where Certiorari is taken away by the statute, the Crown is not barred].—The general clause taking away the *certiorari*, usually inserted in modern statutes, does not, however, extend to the Crown, which can only be barred by an enactment in which it is expressly referred to by *nomination*; and there is no difference in this respect between the Crown and a private individual preferring an indictment or information in his own name, as every prosecution is considered in law to be on behalf of the Crown. (*R. v. Boulbee*, 4 Ad. & E., 496). A *certiorari* would be granted to remove a conviction obtained for fraudulent and collusive purposes, as where a master malster had procured a conviction of one of his servants under the Excise Acts, the certificate of which would operate as a bar to any prosecution against himself. (*R. v. Gillyard*, 12 Q. B., 527).

APPREHENSION OF OFFENDERS.

(See "ARREST.")

With regard to the apprehension of offenders escaping from Van Diemen's Land or South Australia to New South Wales, reference must be made to 2 Vic., No. 11, s. 1, which empowers and requires the Magistrates of New South Wales to endorse any warrant issued by the Judge or Justice, &c., of Tasmania or South Australia, upon proof *on oath* of the handwriting of such Judge or Justice, which shall authorize the execution of such warrant within any part of New South Wales and its dependencies; and such offender or offenders may be apprehended and carried either before the endorsing Magistrate or any other Justice of the colony of New South Wales.

By s. 2, the party apprehended, not being or suspected of being a convict, is to be admitted to bail, (if the offence is bailable). The bail bonds are to be in duplicate, — one to be delivered to the officer apprehending, the other to be transmitted to the Chief Clerk or other proper officer of the Supreme Court, to be kept of record, to be estreated as other bail bonds: Provided that parties *not bailable or bailed* shall be remanded to the custody of the apprehending officer to be conveyed to Van Diemen's Land or South Australia.

14 Vic., No. 7, s. 1, (referring to the Imperial Act 6 & 7 Vic., c. 34, *see infra*), enacts that any person in New South Wales charged with the commission of any offence, — (treason and felony and all indictable misdemeanors committed, or charged to have been committed, within any of the Australian colonies, s. 7), — may be apprehended by the warrant of a Magistrate of this territory, just as if the offence had been committed within the ordinary jurisdiction of such Magistrate: (s. 2), and such supposed offender may be committed to prison upon such evidence of criminality as would justify his committal for trial in ordinary cases, there to remain until he can be forwarded to the colony where the offence was committed; upon such committal, *information thereof in writing under the hand of the committing Magistrate, accompanied by a copy of his warrant, and the depositions upon which the same was granted, shall be forwarded to the Governor.*

By s. 3, such Magistrate, upon any such evidence of criminality as would justify a remand for further examination, (where evidence is expected from remote parts), if the offence had been committed within the ordinary jurisdiction of the Magistrate, may commit such prisoner *by way of remand* for such reasonable time, not exceeding one cal. month, until copies of depositions, taken, certified, and attested, shall have been received from the colony in which the offence is alleged to have been committed, and submitted to the same or some other Magistrate; and thereupon such Magistrate may either discharge or *finally* commit such offender: Provided that immediately upon such committal *by way of remand*, information thereof in writing, under the hand of the committing Magistrate, accompanied by a copy of the depositions upon which the remand was ordered, shall be given to the Governor.

S. 4. Bail is to be allowed, or otherwise, as in ordinary cases, for the surrender of the party at a day and place to be specified in the recognizance.

S. 5. Copies of depositions, in cases above-mentioned, taken *by a person having lawful authority to take the same in the Colony where the offence is said to have been committed, if duly certified* under the hand of the person taking such depositions, and *attested on oath by the party producing the same to be true copies* of the original depositions, are to be received in evidence of the criminality of the prisoner.

By s. 2 of 6 & 7 Vic., c. 34, if any person charged with having committed any offence, (o) whether or not within the United Kingdom, and against whom a warrant shall have issued by lawful authority, shall be in any other part of Her Majesty's dominions which do not form part of the United Kingdom, such warrant, being endorsed by some Judge of the Supreme Court of the country where *such party shall be* with his name, in a sufficient authority to the persons bringing the warrant, and to all persons to whom such warrant was originally directed, and to all peace-officers of the place where the warrant shall be so endorsed, to execute the same within the jurisdiction of the Judge who endorsed it, and to apprehend the party, and convey him before a Magistrate of such place.

By s. 3, the offender may, upon sufficient evidence, be committed to gaol, until he can be sent back to the place where the offence was committed. Immediately upon such committal, information thereof *in writing under the hand* of the committing Magistrate, together with a copy of the warrant, shall be given to the Governor, (or, if in England, to the Secretary of State, &c.)

By s. 4, in such case, copies of the depositions upon which the original warrant was granted, certified under the hand of the person issuing such warrant, and attested by the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. (See 14 Vic., No. 7, s. 5).

(o) It may be remarked that, although the warrant to be endorsed under 6 & 7 Vic., c. 34, was confined to offences amounting to treason, or some felony such as the Justices at Quarter Sessions have authority to try under 5 & 6 Vic., c. 38, (see s. 10 of 6 & 7 Vic., c. 34), that limitation is now repealed, and the statute extends to any felony. (See Imperial statute 16 & 17 Vic., c. 118).

The 5th sec. provides that, under a warrant of the Governor, the person so apprehended and committed is to be delivered into the custody of some person or persons named in the said warrant, and to be sent forthwith to the place where the offence has been committed; and, by the 6th section, if such person be not sent within two months after committal, he may apply to any of Her Majesty's Judges where such supposed offender shall be in custody, to be discharged, upon proof of notice of the intention to make the application having been given to the Governor, (or Secretary of State, as the case may be); and a similar provision is made by the 7th sec., that a person apprehended, if not indicted within six months after his arrival in that part of H. M. dominions in which he is charged to have committed the offence, or if, upon his trial, acquitted, is to be sent back to the place of his apprehension free of cost to such person. The 9th sec. provides that it shall not be lawful for any person to endorse his name on any such warrant for the purpose of authorizing the apprehension of any person under this Act, until it shall *have been proved to him, by oath or by affidavit, that the seal or signature upon the same is the seal or signature of a person having lawful authority to issue such warrant whose seal or signature the same purports to be.*

APPRENTICE.

The contract of Apprenticeship is, as its name denotes, (*apprendre*), a bargain for instruction to be bestowed by one person on another, who in return agrees to give up his whole time and services to his master. The contract of binding by 5 Eliz., c. 4, must have been by deed indented; and although 54 Geo. III., c. 96, has dispensed with that formality, still even under it a writing is required, and a mere *parol* binding would not constitute an apprenticeship. The master may, for the misbehaviour of the apprentice, correct him personally, if he do amiss, taking care to use due moderation in the infliction of the punishment; he may also complain of him before the Justices; but he cannot delegate his authority. (9 Co., 76). The contract of apprenticeship is one of those by which a *person under age* is permitted by law to bind himself, "because," said Lord Mansfield, (5 Bro., P.C. 570), "if an agreement be *for the benefit* of an infant, it shall bind him." He may, indeed, elect to avoid the agreement at his full age, (*ex parte* Davis, 5 T. R., 715), or even while under age, *if it be manifestly for his benefit so to do.* (*R. v. Gt. Wigton*, 3 B. & C., 484; *R. v. Lord*, 12 Q.B., 757). If the apprentice himself do not execute the instrument of apprenticeship, it will not be binding. But see *ex parte* Erwin, (decided in 1857), Part III.

The binding is now usually effected by deed, containing covenants by the master and apprentice for faithful discharge of their respective duties towards each other. The master may, as we have seen, correct him personally, if he do amiss; he may also complain of him before Justices of the Peace, or maintain an action against any adult person who has covenanted for the good behaviour of the infant in the deed of apprenticeship, and the liability of such person continues, although the infant should, on coming of age, elect to avoid the deed. (*Cuming v. Hill*, 3 B. & Ald., 59).

The apprentice, on his part, is entitled to have the covenants in the indentures duly performed towards him; and, even independently of the instrument of apprenticeship, the master may be sued, or, in a gross case of misconduct, indicted, for ill-usage and neglect of him. (2 Camp., 650).

9 Geo. IV., No. 8, s. 1, enables persons holding certain offices in New South Wales to take apprentices to serve under them and their successors in office. The persons specified by the Act are the Civil Engineer, the Master Attendant, and Master Shipwright of the colony for the time being, or any other officer in the service of the Government, having the special direction and control of persons of any particular description of trade or calling within the colony. The term of apprenticeship is to be from 3 to 7 years. S. 2. The indenture is to be executed by the parent or guardian of the apprentice, and by the apprentice himself, of the one part, and by the Civil Engineer, or other officer, of the other; and is to contain a specification of the particular art or trade which the apprentice is to be taught.

S. 3. If the apprentice has no parent or guardian living, two Magistrates residing in the district, or the two nearest Magistrates, are to execute the indenture in their stead. S. 4. All masters of apprentices in the colony, whether in the service of Government or not, shall have such and the like powers over such apprentice as the master of every apprentice has by the laws of England, and are in like manner responsible and amenable for the due performance of the contract. S. 5. In cases of difference between the parties, and a complaint having been made, two Justices have authority to make such order, &c., as they think fit: Provided that no apprentice shall be discharged from his indenture unless by order, in writing, under the hands and seals of such Justices.

Sydney Female School of Industry].—10 Geo. IV., No. 4, enables members of a certain society, denominated "The Sydney Female School of Industry," to receive apprentices. 14 Vic., No. 29, provides for the apprenticing of female children admitted into "The Sydney Female School of Industry," to the Secretary for the time being of the said Society, and authorizes such Secretary to apprentice such children to other persons. Directions are given as to the course to be pursued, and the Forms to be used, on these occasions: by s. 17, a Justice, on the complaint of the Secretary of the Society, or of the apprentice, or any person on behalf of the apprentice, may cancel the instrument of apprenticeship; and similar power is given by s. 19, on complaint of any assignee of an apprentice; and by s. 20, a fine not exceeding £10 may be inflicted on any such assignee for ill-treatment, misconduct, or breach of duty towards his apprentice, and also the instrument of assignment may be cancelled. By s. 23, upon order being made to cancel the instrument of assignment, the instrument of apprenticeship revives; and s. 24 inflicts a penalty not exceeding £10 on any person "enticing, or taking away, or employing, or harbouring, or aiding, or being concerned in enticing," &c., any child who shall be assigned by any such instrument of assignment as aforesaid, while such instrument of apprenticeship or assignment, respectively, shall remain in force. Every such fine is to be recovered as offence (1); see *infra*.

5 Will. IV., No. 3, empowers the Governor, from time to time, by any writing duly signed by him, to authorize any two or more fit and proper persons to bind any male and female children of the Orphan Schools, and other poor children sent out at the expense of H. M. Government, or of parishes or charitable institutions, to the colony from home, to be apprentices to such masters, &c., and such trades, as shall be approved of by the Governor;—such male children till age of 21, such female till 21 or marriage. S. 2. The indenture to be executed by the persons authorized by the Governor, of the one part, and by the proposed master or mistress of the other, and to contain covenants to provide sufficient and suitable food, clothing, and bedding; and that such apprentice shall attend Divine service, when practicable, at least once on Sunday, and have particular attention paid to his or her morals; and that such master, &c., shall pay into the Savings' Bank 40s. for each male, and 30s. for each female, for each year during the last three years of their service, for such apprentice; and such indenture is to contain other covenants usual in England. S. 3. Any master or mistress may, with the consent of two Justices, assign such apprentice to any other fit and proper person.

8 Vic., No. 2].—But the most important Act on this subject is 8 Vic., No. 2, which regulates the law of orphan and other apprentices in New South Wales. By it (s. 1) any householder, tradesman, or other person exercising any art, mystery, or manual occupation, may take by indenture, in writing, any apprentice above the age of 12 years, to be instructed, &c., such apprenticeship not to exceed 7 years.

S. 3. When any person is about to be bound, who has no parent or guardian, two Magistrates of the district shall execute the indenture in their stead; if such person is receiving eleemosynary support in any colonial public establishment, those who have the control or inspection of such establishment are to execute, instead of the parents. Two very important colonial decisions on this Act are given at length, *post*, Part III.—*ex parte* Erwin, decided in July, 1857; and *ex parte* Byrne, decided in July, 1849. It is held—that a parent cannot bind his child without the latter's assent,—that the child, unless his parent unequivocally dissent, and claim to control the child's person, can effectually bind himself,—but that if, by the terms of the instrument, the parent is assumed to be an essential party to the contract, such parent himself must ratify, if not execute, the instrument, even although the child has executed, and also entered on the service.

There is (by s. 8) an appeal to the Quarter Sessions. The Act does not apply to articulated clerks of attorneys, &c., or the apprentices of persons in the tuition of scientific or professional pursuits, or on whose binding was paid a premium exceeding £30. (S. 9).

S. 7 of 16 Vic., No. 17, enacts that the neglect, wilfully and without lawful cause, to provide for apprentices necessary food, clothes, or lodging, or the unlawfully and maliciously assaulting them, whereby their lives shall be endangered, or their health actually or likely to be permanently injured, shall be a misdemeanor, punishable with imprisonment, with or without hard labour, for not exceeding 3 years. It would be murder to let an apprentice of tender years perish for want of food.

The apprenticeship may be determined by consent of parties: Provided, if the apprentice be under age, it be for his advantage, and provided the indentures, if any, be got rid of, or by the infant's election at full age, or by the master's insolvency, or by death of the master or apprentice, or under the above statute, 8 Vic., No. 2. The power of ordering a proportionate restitution of the apprentice's fee is not incident to the jurisdiction given by the Legislature to discharge the apprentice. (*East v. Bell*, 4 M. & W., 665).

A master cannot assign his apprentice without the consent of the latter, and though Justices have power to discharge on complaint, they cannot turn him over to a strange master, that being beyond their jurisdiction. (1 St., 48).

An indictment at Common Law may be supported against a master for not providing sufficient food for an apprentice or servant of tender years, and under his dominion and control, whereby the infant becomes sick. (*Russ. & Ryan*, C. C. 20).

If an apprentice be unwell, and there be any probability of his recovery, so as to be able at all to attend to his employment, he has a right to insist on his master providing for him, for the master takes him for better and for worse, and is to provide for him in sickness and in health. (1 St., 99).

By s. 12 of 4 Vic., No. 5, two Justices in Petty Sessions, with the consent of either of the parents, if living, and within the colony, but, if otherwise, then without such consent, may bind by indenture and put out any child in respect of whose maintenance an order shall have been made under the Act, (*Deserted Wives and Children Act*),—such child being 13 years old, but not otherwise,—as an apprentice until he or she shall attain the age of 21, to any master or mistress willing to receive such child, in any trade, business, or employment whatsoever; and every such binding shall be as effectual in the law, to all intents and purposes, as if such child had been of full age, and had bound him or herself to be such apprentice: Provided that such two Justices, previously to executing such indenture, shall inform themselves as fully as they can of the child's age, which age shall be inserted in such indenture, and shall thereupon for the purposes of this provision be taken to be the child's true age, without further proof. And see s. 11 of 22 Vic., No. 6, for provisions for the education of *all* children for whose maintenance an order has been made under 4 Vic., No. 5. See *post*, "Bastard."

S. 5 W. IV., No. 3, s. 4. [*One Justice*].—(1) Any person to whom any child or children shall be apprenticed or assigned under this Act, (s. 3), putting away or transferring, or in any way discharging or dismissing from service, any such apprentice, without the consent of two Justices.

P. Fine not exc. £10: to be recovered either by distress (11 & 12 Vic., c. 43, s. 19), or according to the procedure of 5 W. IV., No. 22. (See *ante*, "Abattoir," Note (A)).

S. *Ib.*, s. 5. [*One Justice*].—(2) For misuse, refusal of necessary provisions, clothing, or bedding; cruelty, or other ill-treatment.

P. Fine not exc. £10: to be recovered as offence (1); and, at his discretion, discharge of such apprentice by warrant and certificate under his hand and seal.

N.B.—*A master is bound to provide medical attendance for his apprentice, though not for his servant.* (*R. v. Smith*, 8 C. & P., 853).

S. 8 Vic., No. 2, s. 4. (P) [*Two Justices*].—(3) Breach of duty, disobedience, or ill-behaviour by apprentice in his or her service. (Q)

P. *Solitary confinement*, not exc. 3 days. This punishment is not to be inflicted on apprentices under 14 years of age, or on any female. (See *ex parte Erwin*, Part III.)

N.B.—*The complaint must be on oath.*

S. *Ib.*, s. 6. [*Two Justices*].—(4) Master misusing, or ill-treating, or neglecting to instruct properly, or otherwise to discharge his duty towards such apprentice.

P. Fine not exc. £10: to be levied by distress; in default, impr. not exc. 3 mths., (11 & 12 Vic., c. 43, s. 22); and, at their discretion, cancellation of indenture: the fine to be appropriated to some charitable institution, or to the apprentice. (R)

N.B.—*The complaint must be on oath.*

S. *Ib.*, s. 5. [*Two Justices*].—(5) Apprentice refusing to serve out the time of his absence as required, (s. 5), or to make reasonable compensation to master. (S)

P. Satisfaction to be adjudged by Justices; in default of giving security to make satisfaction, impr. not exc. 3 mths., and apprentice to serve time equal to time of absence.

N.B.—*The complaint must be on oath; a warrant of apprehension may be issued.*

ARREST.

Arrest is the apprehending or restraining any person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons, without distinction, are equally liable in criminal cases.

(P) S. 5 provides that if apprentices absent themselves, they shall, whenever they shall be found, be compelled, at any future time, to serve their masters for so long as they shall have absented themselves from such service, unless they shall make reasonable satisfaction for loss sustained by such absence; and so from time to time as often as they shall, without leave, absent themselves from their service before the contract shall be fulfilled.

(Q) Appeal allowed, according to 5 W. IV., No. 22, s. 8. See "Appeal."

(R) *Cancellation of Indentures*.—(S. 7). Any two Justices, before whom such complaint is heard and determined, may cancel the indentures and discharge the apprentice, if it appears to them just and reasonable, by a certificate under their hands and seals.

(S) This section (5) is as follows:—"That if any apprentice shall absent himself or herself from his or her master's or mistress's service, before the term of the apprenticeship shall have expired, or before he or she shall have attained the age of 21 years, every such apprentice shall, whenever he or she shall be found, be liable to serve his or her master or mistress for so long as he or she shall have absented himself or herself from such service, unless he or she shall make reasonable satisfaction to the master, &c., for the loss sustained by such absence; and so from time to time, as often as any apprentice shall, without leave, absent himself or herself from such service before the time of such contract shall be fulfilled; and in case such apprentice shall refuse to serve as is hereby required, or to make such reasonable satisfaction, such master or mistress may complain, on oath, to any Justice, who may issue a warrant of apprehension;—the complaint to be heard by two Justices, who shall determine what satisfaction is to be made, &c."

The general rule as to arrests is, that no person is justified in arresting any of the Queen's subjects unless there be a breach of the peace continuing, or unless he has reasonable ground to believe that a breach of the peace which has been committed will be renewed. (*Price v. Seely*, 10 Cl. & Fin., 28). It is also clear that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it; further, he may arrest the affrayers, and detain them until their heat be over, and then deliver them to a constable. (*Timothy v. Simpson*, 1 Cr., M. & R., 757). So, if a person comes into a house, or is in it, and makes a noise, and disturbs the peace of the family, although no assault has been committed, the master of the house may turn him out, or call in a policeman to do so, (*Shaw v. Charritie*, 3 Car. & K., 21, 25); and if a man stations himself opposite to another's house, making a disturbance, exciting others to disturbance and riot, and obstructing the public way, these are facts which may well amount to such a breach of the peace as justifies an arrest. (*Webster v. Watts*, 11 Q.B., 311, 324). It seems clearly established, however, that a private individual, who has seen an affray committed, is not justified in giving in charge to a policeman, who has not, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and when there is no danger of its renewal. (*Baynes v. Brewster*, 2 Q.B., 375). Inasmuch, moreover, as the power of the constable at Common Law to take into custody, upon the information of a private person, under such circumstances must be correlative with that of the latter to give in charge, it follows that the constable will not be justified in taking a party, designated as the offender, into custody upon such information. (*Timothy v. Simpson*, 1 Cr., M. & R., 761). A private individual, also, being present at the time a felony is being committed, may legally and ought to arrest, or aid in arresting, the offender. He may even break into a private house to prevent the commission of a felony, (*Hancock v. Baker*, 2 B. & P., 260); or, a felony having been committed, he may give in charge the guilty party to a policeman. Mere suspicion that a particular person has committed a misdemeanor will not, however, justify the giving him into custody without a warrant. (*Fox v. Gaunt*, 3 B. & Ad., 798).

Again, an arrest and imprisonment may be justified on this ground, that a felony *having been committed*, there was *reasonable and probable cause* to suspect and accuse, and therefore to arrest and imprison, a man with the view of charging him with the offence; whether the facts are sufficient to ground a suspicion in the mind of a reasonable man, is a question of law.

Although it is clear that a private individual cannot arrest upon bare suspicion, a constable may do so. (*Beckwith v. Philby*, 6 B. & C., 639). There is this distinction between the two parties just named: in order to justify the former in causing the arrest of a person, he must not only show reasonable ground of suspicion, but must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. (S. C.)

Special power to arrest is given by particular statutes; *e.g.*, The Police Acts; The Vagrant Act; The Arson Act, (9 & 10 Vic., c. 25, s. 13);

The Enclosed Lands Act, (18 Vic., No. 27, s. 3); The Impounding Act, (19 Vic., No. 36, s. 31); The Better Prevention of Offences Act, (16 Vic., No. 17, ss. 9 & 10), &c. See under the several titles in this work. S. 10 of 16 Vic., No. 17, enacts "That it shall be lawful for any person whatever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him, or deliver him to some constable or other peace officer in order to his being conveyed, as soon as conveniently may be, before a Justice of the Peace, to be dealt with according to law."

General Advice].—Inasmuch as a private individual who directs a police officer to take a person into custody may, by so doing, render himself liable to an action for false imprisonment, (*Hopkins v. Crowe*, 7 C. & P., 373; see *Gosden v. Elphick*, 4 Ex., 445), it is safer, in any doubtful case, for a private person, especially when time will allow, rather than thus acting for himself, to apply to a Magistrate for a warrant; because, whenever the arrest is under a warrant, the party arrested cannot sue in trespass the party who makes the charge, nor can he sustain an action on the case against him, although it should turn out that no offence has been committed; unless he can prove that the party who obtained the warrant acted maliciously and without probable cause. (*West v. Smallwood*, 3 M. & W., 418. See also *Brown v. Chapman*, 6 C. B., 365).

Constable. See "Constable"].—The irresponsibility of a constable in respect of an act done by him officially, affecting the liberty of the subject, is much greater than that of a private individual. "A constable hath great, original, and inherent power with regard to arrest; he may without warrant arrest anyone for treason or felony, or a breach of the peace committed in his presence, and carry him before a Justice; and in case of a reasonable charge of treason or felony, or a dangerous wounding whereby felony is likely to ensue, or upon his own reasonable suspicion that any such offences have been committed, he may arrest the party so charged or suspected, and for that purpose is authorized (as upon a Justice's warrant) to break open doors; and will be justified in so doing, even though it should turn out that the party was innocent, or even that no such offence had been committed." (4 Steph. Com., 412).

Where a particular statute authorizes a constable to take into custody, without warrant, anyone offending against its provisions *within view of* such constable, (as, for instance, the Cruelty to Animals Act, 14 Vic., No. 40, s. 5), it will be requisite for the officer's justification to show that he has acted in strict conformity with the Act. Where a constable has done an act in obedience to a warrant of a Magistrate, he cannot be sued, but only the Justice who has exceeded his jurisdiction. (See s. 23 of 16 Vic., No. 33; and "Constable," *post*). Where a constable acts beyond his authority, he is liable for the excess; or if he exceeds the reasonable bounds of what is required for the due performance of his duties, he becomes a wrongdoer. (*Wright v. Court*, 4 B. & C., 96).

As to the meaning which the Court puts on the words *found committing*, (used in various statutes), see *Simmons v. Millingen*, (2 C. B., 524), where it was held not enough to show that the party arrested has committed the offence, *however recently*; Maule J. says: "These words only

apply where the offender is *actually in the course of committing the offence, to prevent the continuance of a nuisance*; but he cannot justify breaking doors to do it." (*Smith v. Shirley*, 3 C. B., 142).

A Justice].—A Justice of the Peace, without warrant, may himself apprehend, or cause to be apprehended, *by word only*, persons committing a felony or breach of the peace in his presence.

An arrest is usually made by actually laying hands on the party, and detaining him; but if the officer or other party say, "I arrest you," and the party acquiesce and go with him, this is a good arrest. *Secus*, if, instead of submitting, he had escaped. (*Russen v. Lucas*, 1 C. & P., 153). In making the arrest, the constable or party making it should actually seize or touch the offender's body, or otherwise restrain his liberty. The mere requiring the party to go before the Justice is no arrest. (6 B. & C., 528). When the arrest is without warrant, it is sufficient for a constable to state merely that he arrests in the Queen's name; but a private person, if required, must, it should seem, state the cause of the arrest.

The party arrested should not be treated with any unnecessary harshness, beyond what is actually necessary for his safe custody; and therefore it was held that a constable had no right to handcuff a person whom he has arrested on a suspicion of felony, unless he have attempted to escape, or it be necessary to prevent him escaping. (*Wright v. Court*, 4 B. & C., 596).

ARSON.

F. 1 Vic., c. 89, s. 2. Bail disc.—(1) Setting fire to any dwelling-house, any person being therein.

P. Death.

F. Id., s. 3. Bail disc.—(2) Setting fire to any church or chapel, or dissenting chapel, or any house, stable, coach-house or out-house, warehouse, shop, office, mill, malt-house, hopoast, barn or granary, or to any erection or building used in trade.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 15—7 yrs.; (*if female*), impr. 7—3 yrs., h. l. and s. c.

F. 1 Vic., c. 89, s. 4. Bail disc.—(3) Setting fire to, casting away, or in anywise destroying any ship or vessel, with intent to murder.

P. Death.

F. Ib., s. 6. Bail disc.—(4) Setting fire to or destroying ship or vessel, whether incomplete or not, or with intent to prejudice owner or goods, &c.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or (*if male*) 15—7 yrs. on roads; (*if female*), 7—3 yrs. impr., with h. or l. l. and s. c.

F. Ib., s. 9. Bail disc.—(5) Setting fire to any mine of coal or cannel coal.

P. The same.

F. Ib., s. 10. Bail disc.—(6) Setting fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furse, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood.

P. The same.

F. 7 & 8 G. IV., c. 30, s. 17. Bail disc.—(7) Setting fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation, or to any heath, gorse, furse, or fern, wheresoever growing.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*), 5—3 yrs. on roads; (*if female*), 3—1 yrs. impr., h. or l. l. and s. c.

F. 9 & 10 Vic., c. 25, s. 7, (adopted by 14 Vic., No. 16). Bail disc.—(8) Attempting by any overt act to set fire to any building, vessel, or mine,—or to any stack or steer,—or to any vegetable produce of such kind, and with such intent, that, if the offence were complete, the offender would be guilty of felony, although such building, &c., be not actually set on fire.

P. Tr. not exc. 15 yrs.; or impr. not exc. 2 yrs., h. l. and s. c., and w. (*if offender under 18*); or (*if male*) 10—5 yrs. on roads; (*if female*), impr. 5—2 yrs., h. or l. l. and s. c.

F. Ib., s. 6. (τ) Bail disc.—(9) Placing or throwing in, into, upon, against, or near any building, any gunpowder or other explosive substance with intent to damage or destroy same, whether or not any explosion take place, &c.

P. The same.

M. Ib., s. 8. (υ) Bail comp.—(10) Knowingly having in his possession,—or making or manufacturing,—any gunpowder, explosive substance,—or any dangerous or noxious thing,—or any machine, engine, instrument, or thing,—with intent by means thereof to commit,—or for the purpose of enabling any other person to commit,—any offence against this Act.

P. Impr. not exc. 2 yrs., with h. l. and s. c.

F. 1 Vic., c. 9, s. 11, and 9 & 10 Vic., c. 25, s. 10. Bail disc.—(11) Accessories after the fact.

P. Impr. not exc. 2 yrs., h. l. and s. c.

F. 16 Vic., No. 17, s. 6. Bail disc.—(12) Setting fire to any station, engine-house, warehouse, or other building, belonging or appertaining to any railway, dock, canal, or other navigation.

P. Tr. life—7 yrs., or impr., with or without h. l., not exc. 3 yrs.; or (*if male*) 15—5 yrs. on roads; (*if female*), 7—2 yrs. impr., h. or l. l. and s. c.

F. Ib., Bail disc.—(13) Setting fire to any goods or chattels being in

(τ) *Apprehension without warrant*].—9 & 10 Vic. c. 25, s. 13. Any constable or peace-officer may take into custody, without a warrant, any person whom he shall find laying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony under this Act, and may detain such person, and bring him before a Justice; but he cannot be detained after noon of the following day without being brought before a Justice. (S. 14).

(υ) *Search Warrant*].—S. 12 (of same Act). A Justice, on cause assigned upon oath, may grant a warrant to search any house, shop, cellar, yard, or other place, in which any gunpowder, or other explosive, dangerous, or noxious substance, is suspected to be made or kept for the purpose of being used in committing any offence under the Act. (See Forms, Part II.)

any building, the setting fire to which is made felony by this or any other Act.

P. Tr. 10—7 yrs.; or impr., with or without h. l., not exc. 3 yrs.; or (*if male*) 10—5 yrs. on roads; (*if female*), 5—2 yrs., h. or l. l. and s. c.

ASSAULTS.

Of Common Assaults].—An Assault is an attempt or offer to do an injury to the person of another, under circumstances denoting a present intention coupled with a present ability to do such injury, (Selwyn's N.P., 10th ed., 25), whether that injury be actually done or not. Thus, lifting up a stick or a fist in a threatening attitude, so near to the party threatened that a blow might take effect, although the fist or the stick is not brought into actual contact with his person;—presenting a loaded firearm at a person within the distance to which it will carry, though without firing it, or even unloaded, if having the appearance to him of being loaded, and so near that, if it was loaded and went off, it might do injury, (Dict. Parke, B., *R. v. St. George*, 9 C. & P., 493);—striking at, or throwing any substance at another with intent to strike, though the attempt fail,—are assaults in law; but mere words, whatever violence they may threaten, never amount to an assault. (Hawk, B. 2, c. 62, s. 1). These assaults do not include a battery, which consists in some actual and unwarranted force applied to the person; but every battery, however small, includes an assault; *e. g.*, spitting in a man's face, cutting off his hair in derisive, (*Forde v. Skinner*, 4 C. & P., 239), forcibly stripping him of his clothes, (see *Sunbolf v. Alford*, 3 M. & W., 248), or even touching him, if done with the purpose to insult him. And the assault and battery will be equally committed, whether by actually employing the hand, or by any other means, as giving cantharides, (*R. v. E. Button*, 8 C. & P., 660); or placing an infant in a bag, hanging the bag on palings, and leaving it there, (*R. v. March*, C. & Kir., 496); setting a dog on another, or driving a cart wilfully against the carriage of another, by which bodily injury is done to those within it. So, if a drunken man be wilfully pushed against the complainant, (*Short v. Lovejoy*, Bull, N.P., 16); but never where the act is merely the result of accident, or an injury is done in an amicable contest (if lawful), as in wrestling. (Com. Dig. Pleader, c. 3, M. 18).

An assault may also be committed by exposing a servant of tender years to the inclemency of the weather, (*R. v. Ridley*, 2 Campb., 650, 653); by taking indecent liberties with a female pupil of thirteen years of age without her consent, though she may not offer actual resistance, (*R. v. Nicholl*, R. & Ry, 130); and even by a medical practitioner, who wantonly strips a female under false pretence that he cannot otherwise judge of her illness, even though she, under such impression, acquiesces. (*R. v. Rosinski*, 1 M. C. C., 19). Being present at a prize-fight in order to see it, is indictable as an assault. (*R. v. Perkins*, 4 C. & P., 537).

An assault must be against the will of the party assaulted. (*Christopher v. Bare*, 11 A. B.)

It may be well to observe that, although an assault cannot, in law, be committed on one who actually consents thereto, yet where non-resistance

to an act is obtained by fraud, such act *may* constitute an assault. (*R. v. Read*, 1 Den., C. C. 377; *R. v. Case*, *ib.*, 580). There is, however, an appreciable difference between consent and submission; for, although every consent involves a submission, it by no means follows that mere submission involves consent. (*R. v. Day*, 9 C. & P., 724). It is clear, too, that the fact of consent will in general be immaterial, where an actual battery and *breach of the peace* have been committed. An assault seems to be any sort of personal ill-usage, short of a battery, done to another against his consent. Therefore such an act, done with consent, is no breach of the peace or crime. A battery is simply a beating, or some act which the law deems equivalent. It is not only a trespass, but a breach of the peace, and, though done with consent, is *prima facie* illegal. Therefore, the consent of each party in a prize-fight does not legalize the battery, though it negatives the mere assault. (1 Den., C. C. 380, *in notis*).

Cases where even Battery is no offence.—There are many cases, however, in which a battery is no offence. Thus, whenever a man is first assaulted, he may lawfully strike with a violence not exceeding that which appears necessary for the defence of the person, though he cannot justify a battery manifestly excessive, by setting up the first assault from his adversary, (see *Fish v. Scott*, Peake, C. N. P., 135); so he may remove a trespasser from his land after requesting him to depart, and even without such request, where the party is proceeding to acts of destruction and violence, or is forcibly removing goods. (*Greene v. Goddard*, 2 Salk, 641; and 8 Q. B., 206). The use of necessary force in executing legal powers on the person, and for frustrating an attempt to escape, may also at all times be justified, but the force must be necessary, and not wanton. (1 *Russell on Crimes*, 755). But in all cases the force used must be only so great as is necessary for the purpose of effecting the object in view, and if there be an excess of violence, the party will be guilty of an assault. If, therefore, a constable is preventing a breach of the peace, and any person stands in the way, with intent to prevent him from so doing, the constable is justified in taking such person into custody, but not in striking him. (*Levy v. Edwards*, 1 C. & P., 40). An officer is entitled to the possession of the warrant under which he acts, and if he deliver it to the party against whom it is issued, and he refuse to re-deliver it, the officer may use so much force as is necessary to get it again. (*R. v. Milton*, M. & M., 107).

And there are relationships which justify a battery in defence of another: thus, a husband may justify a battery in defence of a wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. (Hawk, B. 1, c. 60, s. 23). But it has been said that a servant cannot justify beating another in defence of his master's son, though commanded to do so, because he is not a servant to the son; and that a tenant may not beat another in defence of his landlord. (Hawk, B. 1, c. 60, s. 24). A battery may also be justified when done in the way of domestic correction by a party having authority to employ it,—as if a father correct his son, a master his scholar or apprentice,—provided the punishment be moderate, and the instrument of correction proper. (Hawk, B. 1, c. 60, s. 24). *Semble*, an imprisonment will not necessarily amount to battery. (*Wilson v. Lainson*, 3 New. C., 307).

Aggravated Assaults].—Assaults in some cases are aggravated, from the places in which they are committed, as in church or churchyard, and Courts of Justice. Assaults aggravated by the mere degree of violence do not differ from common assaults, unless they amount to some felonious act, as stabbing, wounding, or maiming. (See Dickenson, Q. Sessions, 261).

S. 9 Geo. IV., c. 31, s. 27. (v) [*Two Justices*].—(1) *Common Assault*.—Any person unlawfully assaulting or beating any other person.

[MEM.—*The party aggrieved must make the complaint, (s. 27), though the oath may be by a credible witness, (s. 33); and the Justices have no jurisdiction to convict in a penalty against the will of the complainant, where he prays that the defendant may be bound over to keep the peace. (R. v. Denny, 20 L. J. M. C., 189). This would not, however, seem to apply to assaults upon women and children (under 18 Vic., No. 9, Offence 2), as the proceedings in those cases may be taken "either upon the complaint of the party aggrieved or otherwise." (Ib., s. 1).*]

P. Fine not exc., together with the costs of conviction, £5; (w) in default, (either immediately, or within such time as Justices shall appoint), impr. not exc. 2 cal. m., unless sooner paid. (S. 27). (x) and (y)

(v) By s. 29 of 9 G. IV., c. 31, it is provided "That nothing herein contained shall authorize any Justice of the Peace to hear and determine any case of assault and battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any Court of Justice;" but there must be some colour of title, the bare assertion of right being insufficient to oust the jurisdiction. (See *Reg. v. Dodson*, 9 Ad. & E., 704). And if the party used unnecessary violence in asserting it, the question of title should entirely be left out of the Justices' consideration, and the party convicted of the assault; and they have a right to judge whether the question of title really arises in the case they are investigating. If the Justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or that the same is, from any other circumstance, a fit subject for prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this Act. (S. 29). *Seem*, the Justices are the proper judges as to whether the assault was accompanied with an attempt to commit felony. (*Anon.*, 1 B. & Ad., 384).

(w) By 19 Vic., No. 24, s. 22 (Police Act), in all cases of summary conviction for assault, it shall be in the discretion of the Justices before whom any such conviction shall take place, either to inflict the several fines in the several Acts specifying the offence mentioned, or to imprison the person so convicted for any term not exceeding the maximum terms respectively mentioned in the said Acts.

(x) *Certificate of Dismissal where Assault justified or trifling*.—If the offence be not proved, or be justified, or be so trifling as not to merit any punishment, and the Justices dismiss the complaint, a certificate of dismissal is forthwith to be delivered to the defendant, (s. 27), which certificate, or payment of the penalty, will bar all other proceedings. (S. 28). It must be applied for immediately, or before the Justices have separated, (*R. v. Robinson*, 12 Ad. & E., 672; but see *Hancock v. Soames, infra*), and set forth ground of dismissal. (*Skuse v. Davis*, 10 Ad. & E., 635). (See Forms, Part II., *post*). Where a party, on being summoned for an assault, appeared and pleaded "not guilty," and the prosecutor then withdrew his complaint, and the defendant was accordingly discharged, it was held that this was a hearing and dismissal which entitled the defendant to a certificate that the charge had been dismissed as not proved. (*Tunncliffe v. Tedd*, 17 L. J. M. C.,

The fines under this Act are to be given to the Benevolent Asylum in the district, and, if there be not any such, to the Benevolent Asylum in Sydney. See 7 & 8 G. IV., c. 31, s. 27; 11 Vic., No. 29, and 2 Vic., No. 23; and see "Fines," *post*.

S. 18 Vic., No. 9, s. 1. [*Two Justices*].—(2) *Aggravated Assault upon a Female, &c.*—Any person assaulting any female whatever, or any male child whose age shall not, in the opinion of the Justices, exceed 14 years, if the assault is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions of the statute 9 G. IV., c. 31. See *supra*, p. 24.

[*MEM.*—A conviction under this Act will "be a bar to all future proceedings, civil or criminal, for or in respect of the same assault." (18 Vic., No. 9, s. 1).]

P. Impr., with or without h. l., for not exc. 6 cal. m., or fine not exc. (with costs) £20, and, in default of payment, impr., with or without h. l., for not exc. 6 cal. m., unless sooner paid: *And*, if the Justices think fit, to be bound to keep the peace and be of good behaviour for not exc. 6 cal. m. from the expiration of sentence, without surety. (z)

As to assaults on constables, see, *post*, "Police," (19 Vic., No. 24, s. 18; 2 Vic., No. 2, s. 8).

F. 1 Vic., c. 85, s. 4. (A) *Bail disc.*—(1) Shooting at any person,

67; 5 C. B., 533). This may be done, it is conceived, when the complainant does not appear. By a very recent case, (*Hancock v. Soames*, 28 L. J. M. C., 196), it is decided that the granting a certificate under 27 s. of 9 G. IV., c. 31, is a ministerial, and not a judicial act. If the Magistrate finds either of the alternatives stated in s. 27, he is bound to dismiss the complaint, and having dismissed the complaint, he is bound to grant a certificate without any application for it having been made; and (*semble*) he may grant it at any time after the complaint has been dismissed, even although in the absence of the plaintiff; (and see *Costar v. Hetherington*, *Ib.*, p. 198).

(Y) *Penalty, several, on each Offender.—Sureties*.—The penalty in cases of assault can be imposed on each offender, (*Morgan v. Brown*, 4 A. & E., 515), where more than one; but the Justices cannot order them to enter into any recognizance, either with or without sureties, to keep the peace for any given period, in addition to the penalty, for that would be a superadded punishment for the assault, which they cannot impose, their power being exhausted by the infliction of the fine. (*J. Stone's Practice*, 304).

(z) *Recognizance*.—A doubt has been entertained whether the Justices can do more, under this section, than call upon the offender to enter into his own recognizances to keep the peace, and this doubt apparently arises from the fact, that in some statutes it is expressly said that, under certain circumstances, a person may be required to find sureties, (see, *e. g.*, 17 Vic., No. 31, ss. 22, 23); but it is apprehended that the binding mentioned in the statute must mean an effectual binding. Now, the only way in which a person can be bound in his own recognizance is, by entering into a (supposed) bond to pay a certain sum of money, the condition of such bond being the performance of a certain act, (*e. g.*, keeping the peace and being of good behaviour for six months). If the condition is not kept, the bond is forfeited, and the penalty may be enforced by distress on the goods and chattels of the obligor. In the case, however, of a person who has avowedly no goods or chattels, (*as, e. g.*, a pauper or a married woman), such a binding by personal recognizances would be wholly ineffectual and absurd. For the proceedings on recognizance, see "Recognizance," *post*, and s. 2 of 18 Vic., No. 9.

(A) By s. 5 of 16 Vic., No. 17, if, upon the trial of an indictment for these offences, the jury are not satisfied that the defendant is guilty of the felony charged,

—attempting to discharge loaded arms,—or stabbing, cutting, or wounding any person,—with intent to maim, disfigure, disable,—or do some grievous bodily harm,—or to prevent the lawful apprehension or detainer of any person.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 15—7 yrs.; (*if female*), impr. 7—3 yrs., h. or l. l. and s. c.

M. 16 Vic., No. 17, s. 4. *Bail disc.*—(2) Unlawfully and maliciously inflicting upon any other person, either with or without any weapon or instrument, any grievous bodily harm,—or unlawfully and maliciously cutting, stabbing, or wounding any other person.

P. Impr., with or without h. l., not exc. 3 yrs.

F. 1 Vic., c. 85, s. 5. *Bail disc.*—(3) Sending, &c., explosive substances, &c.,—or throwing corrosive fluid, &c., upon any person,—with intent to burn, maim, &c. (See 9 & 10 Vic., c. 25).

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 15—7 yrs.; (*if female*), impr. 7—3 yrs., h. or l. l., and s. c.

F. 1 Vic., c. 89, s. 7. *Bail disc.*—(4) Impeding persons endeavouring to escape from wrecks.

P. The same.

F. 1 Vic., c. 87, s. 6. *Bail disc.*—(5) Assaulting any person with intent to rob. (If the offender is armed, or with one or more persons, &c., see offence under s. 3, *post*, “Larceny”).

P. Impr. not exc. 3 yrs., h. l. and s. c.

M. 11 Vic., No. 30, s. 4. *Bail disc.*—(6) Unlawfully and indecently assaulting any female child under the age of 12 yrs., whether with the child’s consent or not.

P. H. l. on roads not exc. 3 yrs.

F. *Ib.*, s. 5. *Bail disc.*—Second offence (B) is felony.

P. Tr. not exc. 10 yrs., or h. l. on roads 10—5 yrs., first 3 yrs. in irons, at discretion. (11 Vic., No. 34).

they may find him guilty of the misdemeanor of unlawfully cutting, stabbing, or wounding, and he would be punished with impr., with or without h. l., not exc. 3 years.

(B) By s. 6 of said Act, a certificate containing the substance and effect only (omitting the formal part) of the indictment or information, and of the conviction for such indecent assault, purporting to be signed by the clerk or other officer having the custody of the records of the Court where the offender was so convicted, shall, on proof of the identity of the person of the offender, be sufficient evidence of the conviction, without proof of the signature, or of the official character of the person appearing to have signed the same. Jury are not to inquire concerning such previous conviction until after they have inquired concerning such felony, and shall have found such person guilty of the same; and whenever, in such indictment or information, such previous conviction shall be stated, the reading of such statement to the jury, as part of the indictment or information, shall be deferred until after such finding as aforesaid: Provided that if, upon the trial for such felony as aforesaid, such person shall offer evidence of his good character, the prosecutor, in answer thereto, may give evidence of such previous conviction before such verdict of guilty shall have been returned; and the jury shall then inquire concerning such previous conviction at the same time that they inquire concerning such felony. (S. 6).

M. At Com. Law. Bail disc.—(7) Common assault and battery.

P. Fine and impr., with h. l., if actual bodily harm occasioned, (16 Vic., No. 18, s. 28), or both. (See Arch. Cr. Pr., 523).

N.B.—*The Court will not pass judgment for an assault during the pendency of an action for the same assault.* (*R. v. Mahon*, 4 A. & E., 575).

M. 9 Geo. IV., c. 31, s. 24. Bail comp.—(8) Assaulting and striking or wounding any Magistrate, officer, or other person, in preserving a wreck.

P. Tr. 7 yrs., or impr., with or without h. l., for such term as Court shall award; or (*if male*) 5—3 yrs., with h. l. on roads; (*if female*), impr. 3—1 yr., with h. or l. l. and s. c.

M. Ib., s. 25. Bail disc.—(9) Assault with intent to commit a felony [or a rape, or unnatural offence, or an indecent assault, (16 Vic., No. 18, s. 28).]

P. Impr., with or without h. l., not exc. 2 yrs.; also, fine and sureties to keep the peace.

M. 11 Vic., No. 30, s. 1. Bail disc.—(10) Assault with intent to commit a rape, or with intent unlawfully and carnally to know and abuse any girl under the age of 10 years.

P. Tr. 15—7 yrs.; or h. l. on roads 10—5 yrs, of which the first three may be in irons, at discretion.

M. 9 Geo. IV., c. 31, s. 25. Bail disc.—(11) Assault on peace officer or revenue officer on duty, or any person acting in his aid.

P. Impr. with h. l. not exc. 2 yrs.; also, fine and sureties to keep the peace.

M. Ib. Bail disc.—(12) Assault on any person, with intent to resist or prevent the lawful apprehension or detainer of the person assaulting, &c.

P. The same.

M. Ib. Bail disc.—(13) Assault in pursuance of any conspiracy to raise the rate of wages.

P. The same.

M. 16 Vic., No. 17, s. 11. Bail disc.—(14) Any person liable to be apprehended under 16 Vic., No. 17, assaulting or offering any violence to any person by law authorized to apprehend and detain him, or to any person acting in his aid or assistance.

P. Impr., with or without h. l., not exc. 3 yrs. (c)

ATTEMPTS TO COMMIT CRIMES. (D)

An attempt to commit a felony is a misdemeanor, and every attempt (not every intention) to commit a misdemeanor is a misdemeanor, (*R. v.*

(c) *Apprehension of offenders under 16 Vic., No. 17*.—By s. 9, any person whatever may apprehend any person found committing any offence against the Act, and convey him, or deliver him to some constable in order to his being conveyed, before a Justice. And see s. 10, *supra*, p. 19.

(D) By 16 Vic., No. 18, s. 9, If, on the trial of a person charged with any felony or misdemeanor, it shall appear to the jury, upon the evidence, that the defendant did not complete the offence charged, he is not to be acquitted, but the jury may find him guilty of the attempt, and he is liable to be punished as if convicted upon an information for attempting to commit the particular felony or misdemeanor charged in the said indictment.

Higgins, 2 East., 8); and an attempt to commit a statutable misdemeanor is as much a misdemeanor as an attempt to commit a common law misdemeanor. (*Schofield's case*, Russ. & R., C. C. 107).

At Common Law it is a misdemeanor to *incite* another to the commission of any indictable offence, though the solicitation does not succeed. (*R. v. Higgins*, 2 East., 5).

By 3 Geo. IV., c. 114, the Court may sentence a person having attempted to commit a felony to "imprisonment with hard labour, for any term not exceeding the term for which such Court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before this Act."

M. at Com. Law. Bail disc.—(1) Attempt to commit felony. (1 B. J., 314).

P. Fine or impr., or both.

M. at Com. Law. Bail comp.—(2) Attempt to have carnal knowledge of a girl under 12. (1 B. J., 314).

P. The same, and h. l. (16 Vic., No. 18, s. 28).

M. 11 Vic., No. 30, s. 3. Bail disc.—(3) Unlawfully and carnally knowing and abusing any girl above the age of 10 years, and under the age of 12 years.

P. Tr. 10—5 yrs., or 10—5 yrs. h. l. on roads, and, if Court think fit, in irons for first 3 yrs.

N B.—*The jury may acquit of the offence, and convict of the attempt, and Court may sentence offender to h. l., with or without impr., (sic!) for not exc. 3 yrs.* (S. 3).

M. at Com. Law. Bail comp.—(4) Attempt to commit misdemeanor, whether statutable or at Common Law. (*R. v. Rodrick*, 7 C. & R., 795).

P. Fine or impr., or both.

ATTEMPTS TO MURDER, &c.

F. 1 Vic., c. 85, s. 2. Bail disc.—(1) Administering poison or other destructive thing, or stabbing, cutting, or wounding, or causing bodily injury, with intent to commit murder.

P. Death.

F. Id., s. 3. Bail disc.—(2) Attempting to administer poison, &c., or shooting at, &c., or attempting to drown, suffocate, or strangle, with intent to murder.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or (*if male*) 15—7 yrs. h. l. on roads, of which the Court may direct the first 3 yrs. in irons; (*if female*), 7—3 yrs. impr., with h. or l. l. and s. c.

F. 9 & 10 Vic., c. 25, (adopted by 14 Vic., No. 16), ss. 2, 3, 4, 6. Bail disc.—(3) By the explosion of gunpowder or other explosive substances, destroying any building with intent to murder, &c., or disabling, or doing grievous bodily harm.

P. The same, and w. if a male under 18. (S. 9).

F. Ib., ss. 7, 10. Bail disc.—(4) Accessories *after* the fact under 1 Vic., c. 85, and 9 & 10 Vic., c. 25.

P. Impr., h. l., and s. c., for not exc. 2 yrs. ; and w. (if male under 18).

F. 16 Vic., No. 17, s. 3. Bail disc.—(5) Unlawfully applying or administering, or attempting to apply or administer, to any other person, any chloroform, laudanum, or other stupifying or overpowering drug, matter, or thing, with intent thereby to enable such offender or any other person to commit, or with intent to assist such offender or any other person in committing, any felony.

P. Tr. life—7 years ; or impr., with or without h. l., not exc. 3 yrs. ; or (*if male*) 15—5 yrs. on the roads ; (*if female*), impr. 7—2 yrs., with h. or l. l. and s. c.

ATTORNEY-GENERAL.

By the General New South Wales Act, (9 G. IV., c. 83, s. 5), the Attorney-General is invested with the functions of a Grand Jury, in respect to finding Bills, or more properly Informations. As this important discretion is now exercised by him, all depositions, examinations, and confessions, &c., are to be forwarded to the Attorney-General's Office. In his office, also, are filed all proceedings on Coroners' inquests, &c. By 4 Vic., No. 22, s. 10, the Governor is empowered to appoint any officer or officers, by whom and in whose name all crimes, misdemeanors, and offences cognizable in the Courts of General Quarter Sessions in all parts of the colony may be prosecuted ; but nothing herein contained shall limit or control any authority of the Attorney-General. (See Foster, Dist. Ct. Intr., 100) ; and see, as to the transmission of depositions, s. 2 of 14 Vic., No. 43, (Justices' Act).

AUCTIONEERS—LICENSED.

11 Vic., No. 16, s. 2.—“ No person whatever, who at any time shall exercise the trade and business of an auctioneer or seller by commission at any sale of any estates, goods, or effects whatever, by outcry, knocking down of the hammer, candle, lot, parcel, or any other mode of sale by auction, or whereby the highest bidder is deemed to be the purchaser, or who shall act in the capacity of an auctioneer or seller by commission as aforesaid, shall deal in, sell, or put up to sale or resale any estate, goods, or effects whatsoever, by public sale, or by way of auction, without previously having taken out a license ;” this license is to contain the true name and real place of abode of the party taking out the same. There are two kinds of licenses—General License, for which £15 is to be paid, and District License, for which the fee is £2 ; and they are in force until the following first day of January, unless forfeited. If the licenses are only to run a certain part of the year, a proportionate part of the license fee is to be paid. (S. 2). Every applicant for a license is, on or before the first Tuesday in November, to deliver to the clerk, or person officiating as clerk, of Petty Sessions for the district, &c., where the applicant resides, a notice, in writing, of his intention to apply for the same ; and (s. 4) such clerk, &c., shall cause a list of the names of all such applicants, together with their places of abode, to be posted up, on or before the third

Tuesday in November, in some conspicuous place inside, and also outside, every Police Office at which such Petty Sessions shall be held, and shall keep it so posted up until after the day of the annual licensing meeting; and (s. 5) the clerk is to cause notice of such annual licensing meeting to be inserted in the *Gazette*, and also to be affixed to the door of the Court-house, at least one calendar month before the holding thereof. By s. 6, a general meeting, to be called the "Annual Meeting for the Licensing of Auctioneers," of the Justices for or usually residing in each police district of the colony, in which Petty Sessions shall be held, shall be holden in their respective Court-houses, or usual places of meeting, on the fourth Tuesday in the month of November, in every year, for the special purpose of taking into consideration applications for such licenses; and where there shall not be two Justices resident in any district, any one Justice so resident shall be sufficient to constitute a meeting. Such meetings (s. 7) may be adjourned from time to time by the Justices, provided such adjournments do not, in the whole, exceed one calendar month from the day appointed for such meeting. (S. 8). Whenever, at any such meeting, or adjournment thereof, two Justices, usually residing in the district, are not present at one o'clock, any one Justice resident in the district may adjourn the meeting for a week, and give notice to all other such Justices; and if at such adjourned meeting two Justices, usually resident, &c., are not present at one o'clock, such Justice may do all such things as the annual licensing meeting can do. These meetings are in open Court, and certificates authorizing a license are to be granted to persons approved by such Justice or Justices, or the majority of them. (S. 10).

The Justices, &c., are to transmit to the Colonial Treasurer, or other duly appointed person in that behalf, within fourteen days after the granting thereof, a list, signed by such Justices, &c., specifying the names and residences of all persons to whom such certificates have been granted; and (s. 12) the certificate is null and void, unless the same, and the sum to be paid for the license, be lodged in the Colonial Treasurer's Office, &c., on or before the thirty-first day of December next ensuing the annual licensing meeting; but (s. 13) default in lodging such certificate, or in payment of the required sum, may be cured under certain circumstances, upon payment of a fine of £5 within one calendar month of the time limited for the payment of the license fee. Special licensing meetings may be (s. 14) convened, where any injustice or material injury of a public nature will be occasioned by delay in the granting of a license under this Act. (See 16 Vic., No. 21, as to the repeal of certain sections of this Act relating to duties on Sales, and also to Sureties).

S. 11 Vic., No. 16, s. 23. (E) [*Two Justices*].—(1) Sheriff, Under Sheriff, Master in Equity, or Registrar of the Courts of Requests or Small

(E) Every auctioneer selling any estate, goods, or chattels seized by the Sheriff or by his authority, or by him taken for the benefit of creditors in execution of any judgment, shall specify and enumerate in the catalogue the exact sum to be levied under such execution, as also the particular estates and effects to be sold, and the exact amount bid and offered at all such sales respectively; and the Sheriff, Under-Sheriff, the Master in Equity, and the Registrar of the Courts of

Debts Courts, inserting, or suffering to be inserted, in any catalogue to be subscribed, signed, and certified under s. 23, (Note e), any sum or sums as bidden or offered for any estate, goods, chattels, or effects whatsoever, other than such as were really and truly the property of the debtor,—or omitting or neglecting to certify on such catalogue the true sum to be levied,—or certifying a false sum.

P. Fine £20—£5. If not paid in 6 days after conviction, levied by distress; if not sufficient distress, impr. not exc. 6 cal. m., or until fine be paid. (11 & 12 Vic., c. 43, ss. 19, 21).

S. *Ib.*, s. 24. [*Two Justices*].—(2) Any auctioneer, or seller by commission, or person acting in that capacity, dealing in, selling, or putting up to sale or resale any estate, goods, or effects whatsoever, by public sale, or by way of auction, after sunset or before sunrise.

P. Fine £20—£2: recoverable as offence (1).

By 14 Vic., No. 34, all sales by auction, or by private bargain or contract, or otherwise, of any wool, tallow, hides, and skins actually grown and produced in the colony of New South Wales, and of any other produce of the growth of the said colony, and of any sheep, cattle, and horses, and of the right or supposed right of the owner of such sheep, cattle, or horses to any demise or license for the occupation of any waste land of the Crown in the said colony, on which the said sheep, cattle, or horses shall or may be depasturing, whether the said cattle, sheep, and horses, and the right or supposed right of the owner or owners thereof to any such demise or license of any waste land of the Crown in the said colony on which the said sheep, cattle, and horses shall or may be depasturing, shall or shall not be sold at one and the same time, or at other and different times, or to one and the same person, or to other and different persons, or whether the right or supposed right of such owner or owners to any such demise or license shall or shall not be given in to the purchaser or purchasers of such sheep, cattle, and horses, shall be, and the same are hereby declared to be, wholly exempt from the said rates or duties imposed by 11 Vic., No. 16.

By s. 2, every auctioneer or seller by commission, or other person by whom such last mentioned sale or sales shall be had, made, or effected,

Requests and Small Debts Courts shall subscribe and sign such catalogue, and certify at the foot thereof that all and every the estate, &c., sold, and in such catalogue specified, &c., were really and truly the property of the person against whom such judgment was had and obtained, and that the same, and every part thereof, were actually seized on the execution of the same judgment; and this catalogue, so signed and certified, the auctioneer shall produce to the Colonial Treasurer. By 13 Vic., No. 13, s. 1, the Bailiffs of the Courts of Requests, and also of the Courts of Petty Sessions, shall have power and authority to sell by public auction all goods and other property, of whatever kind, taken by them respectively in execution, by virtue of process, issued from the said Courts respectively, without taking out an Auctioneer's license; and the provisions of this section, by s. 82 of 22 Vic., No. 18, (the District Courts Act), are extended to Registrars and Bailiffs of District Courts held under the latter Act, and to their assistants. By s. 2 of 13 Vic., No. 13, all leases of Crown lands, or any property within the colony belonging to the Crown, or to intestate estates, may be sold by auction by any Clerk of the Bench, Chief Constable, or other person duly authorized in that behalf by the Governor, without taking out any license.

shall include all particulars of any such sale in any account which he shall deliver to the Colonial Treasurer, or at his office, or to such other person as shall be appointed to receive the accounts of sales made by persons exercising the trade or business of auctioneers or sellers by commission, in the same manner as is now required under the provisions of the said Act.

AWARD.

Criminal cases cannot be referred to arbitration; but minor offences, such as common assaults, libel, trespasses, and the like, where the party has his remedy by action as well as by indictment, may be referred.

A compromise of an assault coupled with a riot, and an obstruction of a public officer in the execution of his duty, is not legal, though sanctioned by the Judge, because it is a matter of a public nature. (*Keir v. Leeman*, 5 Q. B., 308).

BAIL.

Bailing the Accused].—The powers and duties of the Justices, as regards taking Bail, are defined by the 23rd sec. of 11 & 12 Vic., No. 42, which has made a material alteration in the law as it previously stood. (Sec 10 Vic., No. 6). Formerly two Justices were required, in cases of felony, to grant bail, and in almost all cases of misdemeanor they were bound to grant it. Now, by the sec. above mentioned, one Justice may grant bail in cases of felony, and in certain *specified misdemeanors* a discretion is given to the Justices whether they will grant it or not. (F) If they grant bail at once, it will be according to the Form (S. 1, in the Schedule to the Act; see Forms, *post*, Part II., "Justices"), accompanied by the Notice (S. 2). After committal, the committing Magistrate may grant bail himself, by attending at the prison, and taking it according to the Forms (SS. 1 & 2); or he may enable any other Justice to take bail by endorsing on the warrant of commitment the following certificate, (S. 3):—

I hereby certify that I consent to the within named A. B. being bailed by recognizance, himself in and (*two*) sureties in each.

J. S.

Any Justice attending the prison may take bail by virtue of the certificate; but if the sureties should feel it inconvenient, or be unable to attend at the gaol, the committing Justice may make a duplicate of the certificate in the warrant, on a separate piece of paper, thus (S. 4):—

Whereas A. B. was on the day of committed by me to the
at , charged with, &c. (*naming the offence shortly*),
I hereby certify, &c., as in the previous Form, (S. 3).

This duplicate being produced before any Justice of the Peace for the colony, will enable him to take the recognizance of the surety or sureties

(F) Under the various titles in this book, the offences where the Justices have a discretionary power are distinguished from those where they are bound to accept bail.

in conformity with such certificate; and upon such recognizance being transmitted to the keeper of the gaol to whose custody the accused has been committed, together with the certificate above mentioned, any Justice of the Peace attending the said gaol, to whom the said recognizance and certificate may be produced, may take also the recognizance of the accused party, and thereupon order him to be discharged out of custody; for which purpose, however, he must lodge with the gaoler a warrant of deliverance, in the Form (S. 5), as prescribed by the 24th sec. of the Act. In all cases, indeed, the order of deliverance must be lodged with the gaoler, where the accused is bailed by a Justice after his committal to gaol.

The object of the above section is to invest the Magistrates with such powers in regard to bail as would enable them to act after committal as well as before, and thus prevent the necessity of an application to the Judges of the Supreme Court,—an application always attended with great expense and delay to the accused. The course pointed out to avoid this is one of easy application, and only requires the possession of the printed Forms given by the Act, to be carried into practice with very little trouble. In felonies and those offences particularly specified at the commencement of the 23rd sec., it is certainly discretionary with the Justices whether they will take bail or not; but if after committal bail be tendered, it should only be refused on such grounds as would induce a Judge to refuse it also, and not merely because the application could be made to a Judge. In many cases it is the fault possibly of the parties employed by the accused to procure their discharge, who, instead of endeavouring to obtain bail from the Justices under the provisions of the section now under consideration, apply at once to the Supreme Court for a *habeas corpus*. Undoubtedly it might be inconvenient for the committing Magistrate to go down to the gaol after committal, but this might be avoided in all cases which the Magistrates might consider fit ones for bail, by their endorsing on the warrant of commitment the certificate previously mentioned, which would enable any other Magistrate, as before shown, to take the required bail. In what cases bail should be taken, and on what grounds refused, it will now be attempted to be shown.

Considerations in taking Bail.—The object of taking bail is simply to secure the appearance of the accused for the purposes of his trial, previously to which his confinement is only tolerated for safe custody, and not in reference to any probability of his guilt. Neither is he allowed bail in any presumption of his innocence; after an investigation, indeed, which has ended in his committal for trial, the presumption, *in point of fact*, is rather the other way; but he is allowed bail because his trial cannot take place immediately.

Upon this subject Judge Coleridge thus expressed himself in a recent case :—"I conceive that the principle on which parties are committed to prison by Magistrates previous to trial, is for the purpose of *ensuring the certainty of their appearing to take their trial*. It seems to me that the same principle is to be adopted on an application for bailing a person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. *It is on that account alone*," (viz., the probability of the accused's appearance to take his trial), "that it becomes

necessary to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy." (*R. v. Scaife and wife*, 9 D. P. C., 553).

The view here taken is completely borne out by the principle of the statute of 5 & 6 W. IV., c. 33, s. 3, which empowered Justices to admit to bail persons charged with felony, even after they had confessed their guilt; (and see 10 Vic., No. 6). The matter, therefore, for the consideration of the Magistrates, in determining upon the acceptance of bail, where they have a discretion, is the likelihood of the appearance of the accused party to take his trial; and if they have reason to think that he will not so appear, they will only exercise a wise discretion in refusing to admit him to bail.

In those cases where the accused is entitled to bail as a matter of right, the Justices are bound to grant it, on being satisfied of the pecuniary sufficiency of the sureties. A Magistrate cannot, in such cases, to use the language of Lord Denman, "lawfully reject bail at his own discretion, nor is he at liberty, when bail is offered, to enter into an investigation as to the character or opinion of such bail, provided he is satisfied of their sufficiency to answer for the appearance of the party, in the amount reasonably required for that purpose." (*R. v. Badger*, 4 Q. B., 472). The same principle was upheld by Mr. Baron Martin, who held that it was no objection to the persons proposed as bail in a criminal case, that they were indemnified by or on behalf the prisoner. (*R. v. Broome*, cited in Wise's Supt. to B. J., p. 60). And see, on this subject, the Notes to s. 23 of 11 & 12 Vic., c. 42, *Plunkett's Australian Magistrate's Pocket Book*, pp. 60, 63.

The summary of the 23rd sec., (as given in *Oke's Synopsis*), may be thus briefly stated:—

1. That it is *discretionary* with the examining Magistrate whether to admit to bail in all cases of felony, assaults with attempt to commit felony, and in the other specified misdemeanors, (see s. 23); and in these cases it is *discretionary* with him whether he will certify his consent to bail being taken by another Justice.
2. That, in other misdemeanors than those specified, he *must* take bail, if tendered and sufficient; and, if the accused is committed, he *must* certify his consent to bail.
3. If the accused committed, and the committing Magistrate certify his consent, where such consent is optional, as in case 1, any Justice, &c., may take the recognizances of the sureties, and a visiting Justice of the gaol take the recognizances of the accused there, and of his sureties also, if convenient.
4. If the accused committed for the misdemeanors not specified, (as in 2), a visiting Justice of the prison, or any Justice, may admit him to bail.
5. The committing Justice, after committal, may take bail for any offence, either at the gaol, or the sureties for the accused elsewhere, and then certify, when the accused's recognizance may be taken by the visiting Justice.
6. Justices are not to admit to bail for treason,—and under no circumstances do they, upon a charge of murder.
7. There must be at least one surety, the accused's recognizance alone

not being sufficient, as on a remand; but it is usual to require two sureties.

8. The amount of the recognizance is discretionary with the Justices certifying, or (where not certified) with the Justice taking the bail; but the recognizance of the accused himself is usually double that of each of the sureties.

We may conclude this subject by mentioning that the power of a Magistrate to accept or refuse bail in cases of misdemeanor is a *judicial* duty, and an action will not lie against him for refusing to take bail in such cases, without proof of express malice, even though the sureties tendered are found by the jury to have been sufficient. (*Linford v. Fitzroy*, 13 Q. B., 240). (a) An infant may enter into a recognizance, for, in *ex parte Williams*, (13 Price, 670), it was held that infancy was no ground for discharging a forfeited recognizance.

Practice.—The practical mode of taking bail is for the prisoner to procure one or two responsible sureties, who, together with himself, become bound in a recognizance for his appearance at the ensuing Sessions of the Supreme Criminal Court, Circuit Court, or Quarter Sessions, as the case may be. The amount in which the prisoner and sureties should be respectively bound is left to the discretion of the Magistrates, and should be ascertained with reference to their relative situations in life or property. Among the lower classes, it is usual to require a prisoner to be bound in £50, with two sufficient sureties in £25 each; and, as to persons in more affluent circumstances, the amount may vary from £100 to £1000. The usual amount demanded at the Sydney Police Office is,—in cases of felony, the principal, £80, and two sureties, £40 each; in misdemeanors, £40, and two sureties in £20 each. Four or more sureties may be taken for the amount, if the Justice thinks fit.

The following Form should be repeated by one of the Magistrates, or their clerk, to the prisoner and his sureties:—

You, A. B., acknowledge to owe to our Sovereign Lady the Queen the sum of Fifty pounds, and you, C. D. and E. F., also acknowledge to owe to our Sovereign Lady the Queen the sum of £25 each, to be made and levied upon your respective goods and chattels, lands and tenements, to the Queen's use, if default shall be made in the condition of this recognizance; which is, that you, the said A. B., shall personally appear at the next sessions of the Supreme Criminal Court, (Circuit Court, or Quarter Sessions, as the case may be), to be holden at _____ on the _____ day of _____ next, at the hour of ten o'clock in the forenoon, then and there to answer any Indictment (H) which may be preferred against you, the said A. B., for the offence with which you now stand charged; and not depart thence without leave of the Court.—Are you severally content to be bound?

Notice of Recognizance of Bail to be given.—The prisoner and his sureties having respectively signified their assent to this recognizance, the former may be discharged from custody. Each person bound, however, should have a *notice*, containing the particulars of the recognizance, signed by one of the Magistrates, delivered to him. (S. 2).

(a) This case is given at length, *post*.

(H) By 13 Vic., No. 7, s. 6, the word "indictment" includes an information, in all pleadings, civil and criminal.

Recognizance forwarded to proper Officer].—The formal recognizance is subsequently engrossed for the Magistrates' signatures, (Sch., S. 1), and (in this colony) transmitted with the depositions, &c., *as soon as possible after the conclusion of the case*, to the Attorney-General.

Clerks of Petty Sessions should remember that it is of the utmost importance to the administration of justice that there should be the least possible delay in forwarding the recognizance and depositions.

Power of the Bail].—The party bailed is considered, in law, as in the custody of his sureties, who are considered as his keepers, and they may therefore re-seize, if they fear his escape, and take him before the Justice or Court by whom he may have been committed, and thus the bail may be discharged from their recognizance; but he is at liberty to find new sureties. (2 Hale, 124, s. 7).

The bail may thus seize the person of the principal at any time, (as on a Sunday), or at any place; and, in surrendering they can command the co-operation of the Sheriff and any of his officers, (*ex parte* Lyne, 3 Stark., 132); or the bail may make a complaint before a Justice, and obtain a warrant of apprehension.

BAILEE.

See "CARRIERS," "LARCENY."

BAKER.

S. 6 W. IV., No. 1, s. 2. (1) [*Two Justices*].—(1) Any person knowingly putting into, or in anywise using, in making bread for sale, under any colour or pretence whatsoever, any alum, or other mixture in which alum is an ingredient, or any other mixture or ingredient whatsoever, except those mentioned in s. 1. (κ)

P. Fine £10—£2; to be recovered either by distress, under s. 19 of Jervis's Act, or according to the procedure of 5 W. IV., No. 22. (See Justices, Recovery of Fines, *post*, where s. 1 of 5 W. IV., No. 22, is given at length, and *ex parte* Cockburn, *post*, Part III). (Note 1).

S. *Id.*, s. 3. [*Two Justices*].—(2) Any person making for sale, or selling, or offering for sale, bread of any other denomination or size, excepting French or fancy bread or rolls, than the *one, two, or four pound loaf*, or selling, or offering for sale, any loaf which shall be found deficient of its due weight, when weighed in the shop at the time it is sold, or offered for sale, and which shall have been baked within 24 hours next preceding such sale.

P. Fine £5—£2; to be recovered as offence (1).

(1) *Information, Appeal, &c.*—The complaint must be made within 48 hours next after the offence shall have been committed. When the penalty exceeds £5, there is an appeal in the manner provided by 5 W. IV., No. 22. (See "Appeal").

(κ) 6 W. IV., No. 1, s. 1, provides that all bread for sale, &c., shall be made of flour or meal of wheat, barley, rye, oats, buckwheat, Indian corn, peas, beans, rice, or potatoes, or any of them; and with any common salt, pure water, eggs, milk, barm, leaven, potatoes, or other yeast.

N.B.—*The proof of such baking having been within 24 hours lies on the defendant.*

S. *Id.*, s. 7. [Two Justices].—(3) Any person making for sale, or selling, or exposing for sale, any *household wheaten bread*, or any *mixed bread*, without being respectively marked H and M. (L)

P. Fine 10s. for every pound weight of such bread; to be recovered as offence (1). (Note 1).

S. *Id.*, s. 8. [Two Justices].—(4) Any person exercising or employed in the trade, &c., of a baker, making or baking any bread, rolls, or cakes of any sort or kind on Sunday, or any part thereof,—or selling, or exposing for sale, on Sunday, any bread, rolls, or cakes of any kind, except before 10 a.m., and between 1 and 2 p.m.,—or baking or delivering, or permitting to be baked or delivered, any meat, pudding, pie, tart, or victuals at any time on Sunday after 2 p.m.,—or in any other manner exercising the trade or calling of a baker, or being engaged or employed in the business thereof, on Sunday, except so far as may be necessary in setting and superintending the sponge to prepare the bread or dough for the following day's baking; or any person bringing or taking from any bakehouse any meat, pudding, pie, tart, or victuals during the time of Divine service,—or making any sale or delivery allowed by this sec., except in their bakehouse or shop.

P. Fine £3—£1; to be recovered as offence (1).

N.B.—*Conviction must be within two days of the offence, under this section.*

S. *Id.*, s. 9. [Two Justices].—(5) Any baker or seller of bread neglecting to fix a correct beam and scales, or to provide and keep for use the regulated weights or other sufficient balance, or refusing to weigh any loaf, &c., purchased in his shop, in the presence of the party requiring the same.

P. Fine £5—£1; to be recovered as offence (1). (Note 1)

S. *Id.*, s. 10. [Two Justices].—(6) Any baker, seller of bread, journeyman, servant, or other person employed by such baker, &c., carrying out or delivering any such bread in any cart, &c., drawn by a horse or other animal, without being provided with proper weights, or other sufficient balance,—or at any time refusing to weigh any bread purchased of him, or delivered by his journeyman, &c., in the presence of the person purchasing or receiving the same.

P. Fine £5—£1, by baker or seller; to be recovered as offence (1).

S. *Id.*, s. 11. [One Justice].—(7) If, on weighing any bread which shall be found by any Justice, or any Examiner of weights directed by any Justice, or any constable authorized by warrant upon entering, &c., and searching, &c., for the same, and which shall have been baked within

(1) *Standard wheaten bread* (s. 4) is all bread made of the flour of wheat, which flour, without any mixture or division, shall be the whole produce of the grain, the bran or hull thereof only excepted, and which shall weigh two-third parts of the weight of the wheat whereof it is made. S. 6. All wheaten bread made for sale of any meal, &c., of inferior quality to that used for standard wheaten bread, is *household wheaten bread*, and is to be marked with a large Roman H; and all bread made, wholly or partially, of any other than wheat, &c., is *mixed bread*, and to be marked M, (s. 6).

24 hours next preceding the time of being so searched for and tried,—any deficiency be found in its due weight, on the average of the whole weight of all the loaves of bread of the same denomination or size which shall be then and there found, and which shall have been baked within 24 hours as aforesaid, on view of any such Justice, or upon proof on oath of the party weighing the same.

P. Fine 5s. for every ounce of bread so found deficient; recoverable as in offence (1).

N.B.—*In case of dispute, the proof of such bread not being baked within 24 hours, shall be on such baker or seller; and any Justice, Examiner, or constable may seize all such loaves as shall be found deficient, and such Justice may dispose thereof. There shall be no fine, or seizure, if it shall be proved by the oath of any respectable housekeeper that such deficiency arose from some unavoidable accident in baking or otherwise, or was occasioned by some contrivance or confederacy to injure the accused.*

S. *Id.*, s. 12. [Two Justices].—(8) Any person putting into any corn, meal, or flour which shall be ground, dressed, bolted, or manufactured for sale, any ingredient or mixture whatever, not being the real and genuine produce of the corn or grain which shall be so ground,—or knowingly selling or offering for sale, either separately or mixed, any meal or flour of one sort of corn or grain as the meal or flour of any other sort of corn or grain, or any ingredient whatsoever, mixed with the meal or flour so sold or offered or exposed for sale.

P. Fine £20—£5; to be recovered as offence (1). (Note 1)

N.B.—*This does not apply to any ingredient, &c., employed for cleansing or preserving such corn, &c., from smut, &c., so that every ingredient so used be carefully and effectually removed from such corn, &c., before the same be ground.* (M)

S. *Id.*, s. 14. [One Justice].—(8) Any miller, mealman, or baker, in whose house, mill, shop, stall, bakehouse, bolting-house, pastry warehouse, oat-house, ground, or possession, any ingredient or mixture shall be found which shall, after due examination, be adjudged by any Justice of the Peace to have been deposited there for the purpose of being used in adulterating the purity or wholesomeness of any meal, flour, dough, or bread.

P. (1st offence) not exc. £2; (2nd offence) £5; (subsequent offences) £10; recoverable as offence (1). (Note 1)

N.B.—*Secus, if it appear to the satisfaction of any such Justice that such ingredient or mixture was so deposited without the knowledge and privity of the accused.*

S. *Id.*, s. 15. [Two Justices].—(10) Any person wilfully obstructing or hindering any such search as hereinbefore authorized, or the seizure of any meal, flour, dough, or bread, or of any ingredient or mixture which shall be found on any such search, and which shall be deemed to have been lodged with an intent to adulterate the purity or wholesomeness of

(M) *Search Warrant*.—Bakers' shops, &c., may be searched for adulterated flour, or bread, or ingredients for adulterating the same, either by a Justice, or constable authorised by warrant; and any found may be seized, and disposed of as the Justice may adjudge. (S. 13).

any meal, flour, dough, or bread, or wilfully opposing or resisting any such search being made, or the carrying away any such ingredient or mixture, or any meal, flour, dough, or bread which shall be seized as being adulterated, or as not being made pursuant to this Act.

P. Fine not exc. £10; to be recovered as offences (1). (Note 1)

BANKING COMPANIES.

The Banking Companies' Act (4 Vic., No. 13) must be referred to, to find out the regulations which the Legislature has prescribed for such institutions in New South Wales and its Dependencies. S. 9 provides that the oaths required to be taken under that Act may be taken before any Justice; and any director, manager, cashier, or clerk, taking a false oath, shall be liable to the penal consequences of perjury.

BASTARD.

See "WIVES."

A Bastard is a person begotten and born out of lawful matrimony: the child of a woman who has never been married is a bastard;—the child of a woman whose marriage is unlawful and void is a bastard; as, for instance, where the person to whom she was married had at the same time another wife living; in such case, the children of the second marriage are bastards, whether born during the lifetime or after the death of the first wife;—a child born of a widow at such a time after the husband's death that the husband could not have been the father of it, is a bastard. But, though the usual period of gestation is nine months, it is not invariable, and if the child be born within a few days of that time, it is legitimate. If a woman be married at the time the child is born, the child is legitimate, although it was begotten before marriage. Lord Langdale, (in *Hargrave v. Hargrave*, 9 Beav., 552), has lately laid down, "A child born of a married woman is presumed to be legitimate, and this presumption is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by shewing, (1), husband's incompetence; (2), entire absence; (3), entire absence at the time when the child must in course of nature have been begotten; (4), or shewing that he was present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse; such evidence as this puts an end to the question, and establishes the illegitimacy of the child even of a married woman; but in cases where opportunity of sexual intercourse occurred, and in which any one or two, or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to show that any other man than the husband may have been, or probably was, the father of the wife's child."

By 4 Vic., No. 5, s. 7(N), Complaint on oath may be made, (either by the mother, or any reputable person on her behalf), in case of the deser-

(N) By s. 2, the complaints under this statute, except those under s. 9, are to be heard by two Justices.

tion (o) by any father of his child or children, or where any child shall have been left by the father without adequate means of support; and the like proceedings (p) may be thereupon taken (see "Wives, Deserted") against the father, and such inquiry be had touching his ability to maintain such child, &c., and the like orders respectively be made, &c., as in the case of desertion of a wife. (A Form of Order is given, *post*, Part II).

By s. 8, The preceding section shall extend to and include illegitimate children as well as children born in wedlock: Provided that no man shall be taken to be the father of any illegitimate child upon the oath of the mother only: Provided, also, that in every case where it shall appear to the Justices that the mother of an illegitimate child is able to contribute to its support, they may direct that she shall so contribute as well as the father, in such proportions respectively, and in such manner, as such Justices shall think fit; and if, in any such case, it shall appear that the mother only is of such ability, the Justices may make an order in respect of her alone. (q)

By s. 9, the Justices by whom any order shall have been made under the Act, touching the support of any wife or child, or any other two Justices from time to time in a summary way, (with or without any application for that purpose), may make such orders, in writing, as they may think necessary for better securing the payment and regulating the receipt of the allowance directed for such wife's or child's support, or for investing and applying the proceeds of the goods or rents, if any, directed to be sold or collected, or for ensuring the due appropriation of such allowance to the *bonâ fide* purposes of maintenance, or for causing the child to be properly brought up and educated; and any one Justice may

(o) *Evidence of Desertion*.—Section 7 of 22 Vic., No. 6, provides that where any husband shall have quitted his wife, or any parent his or her children or child, for a period exceeding sixty days, during seven, at the least, of which such wife or children or child shall have been left by him or her without means of support, such husband or parent shall *prima facie* be deemed to have unlawfully deserted his wife or children or child: Provided that nothing in this section shall prevent the Justices from adjudging the fact of desertion on other evidence, or on proof of abandonment for a less period than sixty days, if they shall think fit; and, by s. 8, the wife and husband are, in all proceedings under this Act, (22 Vic., No. 5, and 4 Vic., No. 5), competent and compellable to give evidence on his or her behalf, and for or against each other.

(p) A summons is to issue, directing the offender to appear before two Justices; or, on proof on oath, a warrant to compel such appearance, (s. 1); and by s. 2 of 22 Vic., No. 6, every summons issued under 4 Vic., No. 5, (the above-mentioned Act), may be served personally, or, if he or she cannot be found, at the last or most usual known place of residence; and the party serving such summons may make affidavit of the service thereof, stating therein the *mode, and time, and place* of such service, (and, if not personally, that the defendant cannot be found), before any Justice; and such affidavit may be received by the Justices investigating the case as sufficient proof of due service of the summons, if they shall think fit; and such Justices may thereupon proceed *ex parte*, or may issue a warrant to apprehend the defendant.

(q) *Release*.—It sometimes happens that the putative father has already paid a sum in gross, or given a bond for securing a weekly payment, or an agreed-upon amount, and that the woman has executed a release of all claims. It is conceived that, as the order of maintenance enures for the benefit of the child, such a release is altogether void and inoperative. (See *Stone's M.*, 88).

at any time, in a summary way, inquire into the disobedience or alleged disobedience of, or non-compliance with, any such order, or any order of Quarter Sessions under s. 11, and for that purpose may summon, &c., parties and witnesses, and enforce compliance, &c., either by committal of the offending party until compliance, or by fine of not less than £5, and not exceeding £50. (And see s. 12 of 22 Vic., No. 6).

By s. 10, the procedure is to be according to the Summary Jurisdiction Act, (5 W. IV., No. 22). Bastardy cases are expressly excluded from the operation of Jervis's Act by s. 35 of 11 & 12 Vic., No. 43; and as no power of distress or imprisonment is given to enforce the payment of the fine under s. 9, the case would otherwise fall within the Chief Justice's opinion in *ex parte* Cockburn. On these points see "Justices, Recovery of Fines," where s. 1 of 5 W. IV., No. 22, is given in full; see also "Abattoir," *ante*, p. 1, and "Wife," *post*.

By s. 11, Quarter Sessions may modify orders, whether appealed against or not, and for that purpose every order made by *any two* Justices under this Act shall be transmitted by such Justices, under their hands and seals, to the Clerk of the Peace of the district, within twenty days next after the making of such order.

By s. 16, the amount of *every fine* imposed under this Act shall be appropriated,—one moiety thereof as the Justice in his discretion may direct, either wholly for the use of the wife or child in respect of whose maintenance the *original* order shall have been made, or partly for that use, and partly for the use of the informer or prosecutor; and the other moiety to the Colonial Treasurer.

N.B.—*The fine mentioned in this section is the one provided by s. 9 to be imposed on non-compliance with an order.*

By 22 Vic., No. 6, s. 1, any Justice, being satisfied on oath that any child has been deserted by its father or mother, &c., or that any father, &c., is about to remove from the colony, or to remote parts within the same, to defeat the provisions of the above-mentioned Act, or any order made in pursuance thereof, or of this Act, may issue a warrant for the apprehension of such party.

By s. 2, affidavit of service of summons sufficient to proceed *ex parte*. (See note (N) *ante*).

By s. 3, when an order is made for maintenance, Justices may, if they think fit, immediately on pronouncing their decision, require the defendant to enter into a recognizance, with sureties, for the due performance of such order; and in default of his or her immediately entering into such recognizance, with such sureties as the Justices require, the Justices may commit such defendant to gaol, there to remain until such recognizance shall have been entered into, or the said order complied with: Provided always that no such recognizance or committal shall extend over a longer period than twelve calendar months.

By s. 11, in respect of every child for whose maintenance an order is made under 4 Vic., No. 5, any two Justices, with the consent of the mother, if to be found, or without the consent of either parent, if the child be without means of support, or the parent having the care thereof be of vicious and abandoned character, or an habitual drunkard, may cause such child to be placed in the Destitute Children's Asylum, or any other

public establishment approved of by them, the directors or managers of which shall be willing to receive such child, there to remain, subject to the by-laws and rules and regulations of the institution, and thereupon and thereafter, from time to time, the same or any other two Justices may, by order or orders, in writing, direct the allowance for such child's maintenance to be paid to some officer of such institution, and may, for that purpose, exercise all the powers given to Justices, or, in certain cases, to one Justice, by s. 9 of 4 Vic., No. 5. (See "Wives").

By s. 12, the power given to the Court of Quarter Sessions by s. 11 of 4 Vic., No. 5, of varying an order for maintenance either of the wife or of any children or child, may, upon the application either of the wife or any such child, or of the husband or parent, be exercised from time to time by any two Justices: Provided that notice of every such application be given, before the adjudication, to all parties to be affected thereby, in such manner as such Justices shall direct.

M. 22 Vic., No. 6, s. 9. Bail comp.—(1) Any parent wilfully, and without lawful or reasonable cause or excuse, deserting any of his children under the age of 16 years, and leaving such child without means of support, such parent being able to maintain such child. (Note o).

P. Impr. not exc. 12 cal. m.

BATHING.

See "INDECENCY."

It is indictable for a person to bathe in an indecent manner near a highway or place publicly resorted to, or in any part of a public river. B. J.; and see "Police" (2 Vic., s. 21), *post*, and 17 Vic., No. 25, s. 16.

BENEVOLENT AND BENEFIT SOCIETIES.

See 3 W. IV.; 4 Vic., No. 3; 17 Vic., No. 26; 7 Vic., No. 10; 11 Vic., No. 10.

BAWDY HOUSE.

See "DISORDERLY HOUSE."

BIGAMY.

Bigamy or Polygamy is where a man marries a plurality of wives, or a woman a plurality of husbands. The *first* wife or husband is not a competent witness to prove the first marriage, since neither can be a witness in the other's case; but the *second* is, because the second marriage, in law, is no marriage at all.

A woman was convicted on an indictment for bigamy. It appeared that her first husband had been continually absent from her for seven years next preceding the second marriage, on which occasion she represented herself as a single woman, and was married by her maiden name. The jury, being asked to consider whether she knew her husband to be alive at the time of the second marriage, and, if not, whether she had the means of acquiring the knowledge, found that they had no evidence of

her knowledge, but were of opinion that she had the means of acquiring the knowledge, if she had chosen to make use of them.—Held that upon that finding the conviction could not be sustained. (26 L. J. M. C., 7, *R. v. Briggs*).

F. 9 G. IV., c. 31, s. 22. Bail disc.—(1) Married person marrying another in the lifetime of the former husband or wife, whether the second marriage took place either in England or elsewhere;—a person counselling, aiding, or abetting offender.

P. Tr. 7 yrs.; or impr., with or without h. l., not exc. 2 yrs.; or (*if male*) 5—3 yrs. h. l. on roads; (*if female*), impr. 3—1 yr., h. l. and s. c.

N.B.—*This does not extend to a person marrying a second time, whose husband or wife shall have been continually absent from such person for seven years then last past, and shall not have been known by such person to be living within that time. (Sec. 22).*

BILLIARDS.

See "PUBLICAN."

By s. 36 of Licensed Publicans' Act, (13 Vic., No. 29), on application being made to any Bench of Magistrates, of whom the Police Magistrate, if there be such, shall be one, may grant a *written* permission to any licensed person to allow the game of Billiards to be played in his or her licensed house, on any day except Sunday, Christmas Day, or Good Friday, on payment of £10 in addition to the license fee, and also to the £10 paid for the dispensing with the restrictions in respect to closing, under s. 48.

BLASPHEMY AND PROFANENESS.

All Blasphemies against God, as denying his being or providence,—all contumelious reproaches of our Lord Jesus Christ,—all profane scoffing at the Holy Scriptures, or exposing any part of them to contempt or ridicule,—impostures in religion, or falsely pretending to extraordinary commissions from God,—are misdemeanors. (1 E. P. C., 3). It is not lawful even to publish a *correct* account of the proceedings in a Court of Justice, if it contains matter of a scandalous, blasphemous, or indecent nature. (*R. v. Carlisle*, 3 B. & A., 167). The general law as to this offence is, that it is illegal to write against Christianity in general; or to write against any one of its evidences or doctrines, so as to manifest a *malicious* design to undermine it altogether. But it is not illegal to write with decency on controversial points, whereby it is possible some articles of belief may be affected. The Act of 9 W. III., "For the more effectual suppressing of Blasphemy and Profaneness," is referred to and recognized in the Proclamation read at the opening of Assizes in this Colony.

BOATMEN—LICENSED—(OF SYDNEY).

See "POLICE ACT," (4 W. IV., No. 7).

BREWERS—LICENSED.

See "PUBLICAN," "DISTILLER."

S. 14 Vic., No. 4, s. 1. (R) [Two Justices].—(1) Any public brewer or maker of ale, beer, or porter for sale, using, or causing, or permitting to be used in the brewing thereof, or putting into or mixing with such ale, beer, or porter, or the worts thereof, respectively, any vitriol, cocculus indicus, nux vomica, tobacco, opium, aloes, copperas, fava amara, or any extract or preparation thereof respectively, or any other deleterious or poisonous substance whatever.

P. Fine £200: to be recovered by distress. In default of sufficient distress, impr. at the nearest gaol for not exc. 6 cal. m., to be computed from time of arrest only. (*Id.*, s. 7, and 11 & 12 Vic., c. 43, ss. 19 & 21). All such ale, &c., shall be forfeited, and shall and may be seized by any Inspector of Distilleries or Officer of Customs. (s)

S. Ib., s. 3. [Two Justices].—(2) Any brewer or retailer of ale, beer, or porter having any such poisonous substances in his possession, otherwise than for medicinal purposes, (the proof of which lies on such brewer).

P. Fine £50: to be recovered as offence (1). All such vitriol, &c., shall be forfeited, and shall and may be seized by any Inspector of Distilleries or Officer of Customs. (Note s).

S. Ib., s. 4. [Two Justices].—(3) Any person knowingly selling, disposing of, sending, or delivering to any brewer or retailer of ale, beer, or porter, any vitriol, cocculus indicus, nux vomica, tobacco juice, opium, aloes, copperas, fava amara, or any extract or preparation thereof, respectively, otherwise than for some medicinal purpose, (the proof whereof lies on such person selling, &c.)

P. Fine £50: to be recovered as offence (1). (Note s).

S. Ib., s. 5. [Two Justices].—(4) Any merchant, licensed victualler, spirit dealer, or any other person whosoever, knowingly selling or disposing of any ale, beer, or porter, in which there shall be any vitriol, &c.

P. Fine, £50: to be recovered as offence (1). (Note s)

S. Id., s. 9. [Two Justices].—(5) Any witness, being duly summoned, and not attending at the time and place mentioned in such summons; or having attended, and refusing to be sworn, or to answer any legal question put to him, without alleging sufficient excuse for such refusal, allowed by the adjudicating Justices.

P. Fine not exc. £20: to be recovered as offence (1). Note (s) See, *post*, "Witness."

S. 19 Vic., No. 19, s. 2. [Two Justices].—(6) Any dealer in spirituous or fermented liquors, licensed publican, or any other person knowingly having in his possession any spirituous or fermented liquors so adulterated

(R) Inspectors of Distilleries and Customs Officers may inspect any public brewery, or the utensils therein, at all times, and, if necessary, invoke the aid of the police. (S. 6).

(s) The information under this Act must be *in writing*; the conviction within 3 cal. m. after the commission of the offence complained of.

The question as to what class of cases in this Colony is excluded by s. 35 of 11 & 12 Vic., c. 43, from the operation of Jervis's Act, is considered, *post*, in the first Note to "Distilleries."

as aforesaid; or any such dealer or publican knowingly having in his possession, otherwise than for a lawful purpose, any poisonous, deleterious, or pernicious substance.

P. Fine not exc. £100; and all adulterated liquors, and all poisonous substances, &c., found in the possession of any such dealer or publican, may be seized by any Inspector of Distilleries, Customs Officer, or constable authorized by warrant, and shall be forfeited and destroyed, no mode of recovering the fine being provided. (See "Abattoir," *ante*, p. 1; and "Justices, Recovery of Fines," *post*).

M. 14 Vic., No. 4, s. 2. Bail comp.—(1) Any person, after having been once convicted under s. 1, (offence 1, *supra*), using, or causing, or permitting to be used in the brewing of any beer, ale, or porter, or putting into or mixing with any beer, ale, or porter, or the worts thereof, respectively, any vitriol, &c.

P. Fine, not exc. £500, and impr. not exc. 2 yrs., besides being liable to the other prescribed penalties.

M. 19 Vic., No. 19, s. 1. Bail comp.—(2) Any dealer in spirituous or fermented liquors, licensed publican, or other person putting into or mixing, or causing to be put into or mixed with any spirituous or fermented liquors, any poisonous, deleterious, or pernicious substance whatsoever, or selling or otherwise disposing of, or keeping for sale, any spirituous or fermented liquors so adulterated.

P. Fine, not exc. £200, or impr. not exc. 2 yrs., with or without h. l.

BRIBERY.

See "ELECTION," "MUNICIPALITIES."

M. at Com. Law. Bail comp.—(1) Receiving or offering any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of Public Justice or Public Government, (or any other person).

P. Fine and impr. (Arch. Cr. Pl., 664; 1 Hawk, c. 27, s. 2).

1.—ELECTION.

M. 22 Vic., No. 20, s. 62. (T) Bail comp.—(2) Any person, whether or not an authorized agent of a candidate, having committed any of the acts (U) hereby declared to be acts of bribery and corruption.

(r) No prosecution or other legal proceeding whatsoever, for any offence alleged to be committed, or for the recovery of any penalty alleged to be incurred, under this Act, shall be commenced after the expiration of 6 mths. from the commission of such offence, or the incurring of such penalty. (22 Vic., No. 22, s. 87).

(s) By the Electoral Act, s. 59, they are as follows:—The giving of money, or any other article whatsoever, to any elector, with a view to influence his vote, or the holding out to any elector any promise or expectation of profit, advancement, or enrichment to himself or to any of his family or kindred, friends, or dependents, in any shape, in order to influence his vote, or making use of any threat to any elector, or otherwise intimidating him in any manner, with a view to influence his vote; the treating of any elector, or the supplying him with meat, drink, lodging, or horse or carriage hire, or conveyance by steam or other-

P. Fine, not exc. £200, or impr. not exc. 6 mths., on complaint of the Attorney-General, or of any registered elector of the electoral district wherein such act of bribery, &c., was committed.

S. I b., s. 63. (Note r) [One Justice].—(1) Any person having, or claiming to have, any right to vote in any election of a member of Assembly for any electoral district, and directly or indirectly asking, receiving, or taking any money, or other reward, by way of gift, employment, or other reward whatsoever, for himself, or any of his family or kindred, friends or dependents, as a consideration or inducement, expressed, implied, or understood, for giving his vote, or for abstaining from giving his vote in any such election; or by himself, his friends, or by any person employed by him, by any gift or reward, or by any promise or agreement, or security for any gift or reward, procuring any person to give his vote in any such election, or to abstain from giving the same.

P. Fine £50 to the person who shall *bonâ fide*, and not collusively, first sue for the same. The fine to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to 5 W. IV., No. 22. See, *ante*, "Abattoir," and, *post*, "Justices, Recovery of Penalties," and *ex parte* Cockburn, Part III.

2.—MUNICIPALITIES.

M. 22 Vic., No. 13, s. 27. (v) Bail comp.—(1) Any person guilty of any act of bribery or corruption. (w)

P. Fine or impr., or both.

S. 22 Vic., No. 13, s. 28. (Note v) [Two Justices].—(1) Every person having, or claiming to have, any right to vote in any election of Chairman, Councillor, or Auditor, under the Municipalities Act, and asking or taking any money or other reward by way of gift, loan, or other device,—or agreeing or contracting for any money, gift, office, employment, or other reward whatsoever, to give or to forbear to give his vote in any such

wise, whilst at such election, or whilst engaged in coming to or going from such election; the payment to any elector of any sum of money for acting or joining in any procession during such election, before or after the same; the keeping open, or allowing to be kept open, any public-house, shop, booth, or tent, or place of entertainment, whether liquor or refreshment of any kind be distributed at such place of entertainment or not; the giving of any dinner, supper, breakfast, or other entertainment, at any place whatsoever, by a candidate, to any number of electors, with a view to influencing their votes. (S. 59).

(v) No person shall be liable to any incapacity, disability, forfeiture, or penalty under this Act, unless the action or prosecution be commenced within three months after such incapacity, disability, forfeiture, or penalty shall be incurred. (S. 85).

(w) By s. 27, it is enacted, "That for the purpose of preventing bribery and corruption, all the acts enumerated as acts of bribery and corruption in any Electoral Act in force for the time being, with reference to elections of members to the Legislative Assembly, shall be deemed to be acts of bribery and corruption, *mutatis mutandis*, with reference to all elections under this Act." (See s. 59 of 22 Vic., No. 20, quoted above—Note (s). And the acts of all authorized agents of a candidate shall be held to be acts of their principal, if it be proved that such acts were committed with his consent.

election;—or any person, by himself, or by any other person employed by him, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupting, or procuring, or offering to corrupt or procure any other person to give or to forbear to give his vote in any such election.

P. Fine £50, together with full costs of suit: to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to 5 W. IV., No. 22. See, *ante*, "Abattoir," and, *post*, "Justices, Recovery of Fines."

BURGLARY.

Burglary, at Common Law, is the breaking and entering of the dwelling house of another, in the night-time, with intent to commit a felony therein; and by the 7 & 8 G. IV., c. 29, s. 11, the breaking out of a dwelling-house of another in the night-time, by one who has entered it with intent to commit felony therein, or who has committed felony therein, is also declared to be burglary;—the night-time being between 9 o'clock in the evening and 6 o'clock in the morning of the succeeding day. (1 Vic., c. 86, s. 4). The offence of burglary consists in the invasion of a man's dwelling-house,—(1), effected by fraud or force; (2), in the night-time; and (3), accompanied with the actual commission of a felony, or made with intent to commit a felony therein. (Crim. L. C., 5th R., p. 4). First, s. 13 of 7 & 8 G. IV., c. 29, provides that "no building, though within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary," or for any of the purposes therein stated, "unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other." Subject to the above statutory limitation of the word, every house for the dwelling and habitation of man is taken to be a dwelling-house, wherein burglary may be committed; as, for instance, a set of apartments in a lodging-house, having a separate outer door. (See *Monks v. Dykes*, 4 M. & W., 567).

Burglary cannot be committed in a tent or booth erected in a market or fair, although the owner may lodge there; for the law regards thus highly nothing but permanent edifices. (4 Bl. C., 226). A house in which the owner resides during the day, takes his meals, and carries on his business, but does not sleep, is not a dwelling-house within the definition of the crime of burglary. (*R. v. Martin*, Russ. & Ry., 108). There may, however, be a constructive occupation, by the servant or the family of the owner. Again, there must be both a *breaking* and an *entering* of the dwelling-house. Here may be noticed the distinction between a breaking which constitutes trespass, and a breaking which will support an indictment for burglary. Every entry into the house of another by a trespasser is a *breaking* in law, whereas every unlawful entry by night into a dwelling-house is not, at Common Law, a breaking of the house sufficient to constitute the crime in question, as the gist of this offence is,—and the indictment for it charges,—that the accused "*feloniously and burglariously did break and enter*" the dwelling-house of A. B. with intent to steal therein, or as the case may be. Hence, if the door of a dwelling-house

be open, and a thief enter with intent to steal, this is not burglary, because there is no actual breaking; but if the thief breaks the glass of a window, and with his hand or a hook abstracts the owner's goods, that is burglary.

"So it is deemed an 'entry' when the thief breaketh the house, and his body, or any part thereof, as his foot or arm, is within any part of the house, or when he putteth a gun into a window which he hath broken, or into a hole of the house, which he hath made, of intent to murder or kill. But if he doth barely break the house, without any such entry at all, that is no burglary, to constitute which there must be both a breaking and an entry." 2 East. P. C., 490; *R. v. Davis*, R. & Ry., 499).

There must be both a breaking and an entry. There may be a constructive breaking, effected by stratagem, fraud, or intimidation, sufficient to constitute burglary; as, to knock at a door, and, upon its being opened, to rush in with a felonious intent; or, under pretence of taking lodgings, to gain admittance to a house in the night-time, and then to fall upon the landlord, and rob him; or to procure a constable to gain admittance in order to search for thieves, and then to bind the constable, and rob the house;—all these entries are burglaries, although there was no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. (Bl., 226).

Secondly, it must have been *at night*. Thirdly, there must be a breaking and entering the dwelling-house of another, and *the intent* to commit some felony within the same, whether *such felonious intent be executed or not*.

If it appear that the breaking and entering were to commit a mere trespass, we have just seen that this will not amount to burglary, the injured party being left to his civil remedy. See the arg. *R. v. Powell*, 2 Den., C. C. 405). Where, however, such a breach and entry of a house as has been above described is effected by night, with intent to commit a robbery, a murder, a rape, or any other felony, this is burglary, whether the substantive offence contemplated be actually achieved or not.

It makes no difference whether such offence were felony at Common Law or created so by statute. The intent in breaking and entering may be presumed from the actual commission of the specific felony charged; but it must be averred in the indictment, and proved as laid. (*R. v. Dingley*, cited 2 Leach, C. C. 841). If, therefore, the indictment charged that the breaking and entering were with intent to steal goods and chattels, it would not be sufficient to show that the accused broke into the house with intent to steal mortgage deeds; for mortgage deeds, being subsisting securities for the payment of money, are clearly *choses in action*, and, as such, not properly described as goods and chattels. (*R. v. Powell*, 2 Den., C. C. 403). So, by the Common Law, the stealing of chattels *personal* alone amounts to the crime of larceny; and if an indictment for that offence were to allege that goods and chattels were stolen, proof that chattels *real* were stolen would not support the indictment. (Per Alderson, B. 2 Den. C. C., 409).

On an indictment for burglary, which comprehends within itself an indictment for housebreaking, and usually for larceny in the house, if the jury are satisfied that there was a breaking in the night-time with intent to steal, they may convict the accused of burglary. If they should think

that the breaking was *not in the night-time*, but that there was a breaking, and goods stolen of any value, they may convict of housebreaking, under 7 & 8 G. IV., c. 29, s. 12; or, if they should think the evidence of the breaking not sufficient, they may convict the prisoner of stealing in a dwelling-house to the value of £5.—The rule being, “In order to convict of a felony which was not the felony primarily charged, it is necessary that the minor felony should be substantially stated in the indictment.” (Per Jervis, C. J., in *R. v. Reid*, 2 Den., C. C. 92). See “House-breaking.”

F. 7 & 8 G. IV., c. 29, s. 11. Bail disc.—(1) Entering a dwelling-house by night with intent to commit felony;—or entering a dwelling-house by night and stealing therein;—or being therein and committing a felony, and breaking out in the night-time;—or entering and breaking out in the night-time without committing a felony.

P. Tr. life—10 yrs., (see Callaghan, p. 314); or impr. not exc. 3 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 15—5 yrs., and (if attended with violence to the person, or committed by offender when armed with any offensive weapon, or by means of threat or intimidation), h. l. in irons for not exc. the first three years of his sentence. (11 Vic., No. 34, s. 1).

F. 1 Vic., c. 86, s. 2. Bail disc.—(2) The like, (as above), and assaulting with intent to murder any person therein, or cutting, stabbing, wounding, hurting, or striking any person.

P. Death. (Recorded, 4 G. IV., c. 48).

BUTCHERS.

See “ABATTOIR,” “SUNDAY.”

S. 17 Vic., No. 27, s. 11. [Two Justices].—(1) Any person having in his possession, for the purpose of slaughter for sale,—or slaughtering or causing to be slaughtered for sale, any sheep infected with influenza or catarrh,—or exposing the carcass, or any part thereof, in any public shop, stall, market, or other place.

Fine £20—£1, and such flesh to be destroyed: the fine to be recovered either by distress, (11 & 12 Vic., c. 43, s. 19), or according to the procedure of 5 W. IV., No. 22. See, *ante*, “Abattoir,” (Note A), and, *post*, “Justices, Recovery of Fines.”

S. 5 W. IV., No. 1, s. 1.(x) [Two Justices].—(2) Any person slaugh-

(x) By s. 2, Licenses are to be applied for, in writing, to the nearest Bench of Justices, in August, and such Bench, (two or more being present), if satisfied that the applicant is of unexceptionable character, shall grant to such person a license, which remains in force till 31st December next; the fee of half-a-crown is to be paid to the Clerk of the Bench: Provided that the application for a license shall specify and describe the house or place intended to be licensed, and that the Justice shall consider that the situation of such house shall be unobjectionable. By s. 14, no slaughter-house or place for slaughtering cattle shall be licensed in any town, unless within sixty feet of an accessible river or creek; or, if a seaport, on the sea-beach, within a like distance of high-water mark; and if not on the banks of such waters, or if there shall be no such waters as aforesaid within or adjoining any such town, then not within the boundaries thereof. And, by s. 3, the Bench of Justices (two or more being present), may grant such licenses at

tering, or causing to be slaughtered, any cattle intended for sale or barter, or for shipping, in any house or place not licensed.

P. Fine £10 a head of cattle so slaughtered. If fine not paid, distress warrant may issue; in default of effects, impr. not exc. 3 mths., (s. 17). (11 & 12 Vic., c. 43, ss. 19 & 21). (r)

S. *Id.*, s. 5. [Two Justices].—(3) Any person intending to slaughter any cattle in any town or district in which an Inspector shall be appointed, (under s. 4), and neglecting to give twelve hours' notice, in writing, to such Inspector, of the cattle intended to be so slaughtered, specifying the place and time. (z)

P. Fine £5 a head: recoverable as offence (2). (Note r)

N.B.—*Unless it appear to the Justices that such notice could not have been given, or that, owing to some unforeseen accident, such cattle required to be immediately slaughtered.*

S. *Id.*, s. 5. [Two Justices].—(4) When cattle have been slaughtered in any town or district in which an Inspector shall be appointed, (under s. 4), without having been previously inspected, the neglecting to give immediately notice thereof to the Inspector, or to keep or preserve the skins of such cattle for three days, or to produce them, upon demand, at the place of slaughter, to the Inspector for the town or district wherein such cattle have been slaughtered.

P. Fine £5 for every skin so neglected to be preserved and produced: recoverable as offence (2). (Note r)

S. *Id.*, s. 6. [Two Justices].—(5) Any keeper of a licensed slaughter-house, (except in towns for which Inspectors shall be appointed), neglecting to keep a book, (wherein to enter a particular account of cattle slaughtered, color, brand, sex, age, &c.), or record, or making false entry therein, or failing or refusing to make monthly report to the Bench of Justices, or to produce such book, &c., when so required by any Justice.

P. Fine not exc. £5: recoverable as offence (2). (Note r)

any meeting, to any person of unexceptionable character who shall apply for the same at any meeting of such Bench. S. 4, Inspectors of slaughter-houses are to be appointed by the Governor in certain towns; their duties are therein described, and they are to receive threepence per head of cattle or skin inspected by them (s. 13): to be paid by the keeper of such licensed house or place, and to be recovered before any one or more Justices.

(r) If fine not paid, a Justice may issue a warrant of distress; and, in default of effects, may commit offender to nearest common gaol for not exc. three months, and license, if any exists, becomes void. (S. 17). Appeal to Quarter Sessions, (s. 19), if person convicted shall, with two sufficient sureties, enter into a bond in a penal sum of double the amount of the penalty so incurred.

(z) *Exceptions*.—By s. 19 of 15 Vic., No. 11, cattle-boiling and salting establishments are exempted from giving notice to Inspector, or making entries of description, &c.; but, by s. 20, no license shall be granted, or, being granted, shall be operative for or in respect of any house or premises used as an establishment for the extraction of tallow from the carcasses of cattle, or for the salting of beef for exportation, unless the proprietors of such establishments enter into a recognizance, with two sureties.—Form of recognizance, see Part II. 7 Vic., No. 2, repeals 5 W. IV., No. 1, as far as relates to the appointment of Inspector in the town of Sydney. By s. 2, The Mayor and Council of Sydney, and the Mayor and Council of other towns, &c., which may hereafter be incorporated, are to appoint Inspectors of slaughter-houses, and of cattle intended for slaughter, who are to be notified in

S. Id., s. 8. [*Two Justices*].—(6) Any person, upon demand by any Justice, refusing or neglecting to produce the skins of any cattle slaughtered within one month previous to the date of such demand,—or, in case the same cannot be produced, to give a full and satisfactory account of how and in what manner the skins have been disposed of.

P. Fine not exc. £10 : recoverable as offence (2). (Note γ)

S. Id., s. 9. [*Two Justices*].—(7) Any person cutting out, burning, or otherwise destroying or defacing, any brand which shall have been upon any skin,—or being in possession of any such skin from which the brand shall have been cut or burnt, or otherwise destroyed or defaced, without being able to give a satisfactory account thereof.

P. Fine £10 : recoverable as offence (2). (Note γ)

S. Id., s. 10. [*Two Justices*].—(8) Every tanner, or other person, purchasing a raw hide or skin from which any brand shall have been cut or burnt out, or destroyed, or otherwise defaced.

P. Fine £10 : recoverable as offence (2). (Note γ)

S. Id., s. 15. [*Two Justices, or on view of one Justice*].—(9) Any butcher, or owner or occupier of any such shamble, &c., (in any town), obstructing any Justice, or constable authorized by a Justice in writing, in the inspection thereof,—or neglecting or refusing to comply with directions concerning the cleansing of such premises within a reasonable time.

P. Fine not exc. £2 : recoverable as offence (2). (Note γ)

S. Id., s. 16. [*Two Justices*].—(10) Any person discharging any gun or pistol, or any kind of firearms, in any road, street, or market-place, or in any town, for the purpose, or under the pretence, of killing or maiming any cattle.

P. Fine not exc. £5, or impr. not exc. 1 mth. If fine adjudged, recoverable as offence (2).

S. 15 Vic., No. 13, s. 1. [*Two Justices*].—(11) The owner or occupier of any slaughter-house, in Sydney, not causing any animal (A) that shall die of any disease in such slaughter-house, or in any yard or premises connected with such slaughter-house, to be immediately removed therefrom to some convenient place, not less than one mile from the boundary of the said city, and to be there without delay destroyed by fire.

N.B.—*If such owner or occupier shall prove that he has taken ordinary precaution to prevent the commission of any such offence, the information under this s. shall be dismissed.* (S. 1).

P. Fine £50—£10; if not paid, impr. not exc. 12 cal. m., (s. 18). (S. 23 of 11 & 12 Vic., c. 43).

S. 15 Vic., No. 13, s. 2. [*Two Justices*].—(12) The owner of any animal which shall die of any disease in any part of Sydney, not being a slaughter-house, (see s. 1), nor any yard or premises connected with a slaughter-house,—or the occupier of the place where such animal shall

the *Government Gazette*, and required to perform the duties of such Inspectors as set forth in the Act.

(A) *Interpretation*.—By s. 16, the word "animal" shall, for the purposes of this Act, be held to include horses, cattle, sheep, pigs, calves, and lambs; and the words "die of any disease," to apply to all cases of death other than deaths caused by killing or slaughtering.

have died, neglecting to cause such animal immediately to be removed and destroyed in the same manner as is provided (s. 1) with respect to animals dying at slaughter-houses in Sydney.

P. Fine £10—£2. If not paid, impr. as offence (11).

N.B.—*If such owner, &c., can prove that he has not been guilty of undue negligence, the information shall be dismissed.* (S. 4).

S. 15 Vic., No. 13, s. 3. [*Two Justices*].—(13) The owner of any animal that shall die of any disease in the counties of Cumberland and Camden, within half a mile of any public road or of any dwelling-house,—or the occupier of the place where such animal shall have died, not immediately causing such animal to be destroyed by fire on the spot where it shall have died, if such spot be a quarter of a mile from a dwelling-house;—or such owner or occupier not immediately causing such animal to be removed to some place not less than a quarter of a mile from any dwelling-house, and there destroyed by fire, if the spot where it shall have died be not a quarter of a mile from any dwelling-house.

P. Fine £10—£2. If not paid, impr. as offence (11).

N.B.—*If such owner, &c., can prove that he has not been guilty of undue negligence, the information shall be dismissed.* (S. 4).

S. 15 Vic., No. 13, s. 6. (b) [*Two Justices*].—(14) Any owner or occupier of any slaughter-house used for the slaughter of animals to be used for human food, knowingly causing, or permitting, or suffering any animal infected with any disease affecting the melt or spleen, to be slaughtered in any such slaughter-house,—or if, after the slaughter, the melt or spleen be found diseased, such owner or occupier not immediately causing the entire carcass to be removed and destroyed, as in the case of animals dying by disease.

P. Fine £50—£10. If not paid, impr. as offence (11).

N.B.—*If defendant can prove that he has taken ordinary precaution to prevent the offence, the information shall be dismissed.* (S. 6).

S. *Id.*, s. 8. [*Two Justices*].—(15) Any person designedly blowing with his breath into or upon any meat intended for sale, or ejecting any suet liquid matter or other substance from his mouth thereon.

P. Fine £20—£2. If not paid, impr. as offence (11).

S. *Id.*, s. 11. (c) and (d) [*Two Justices*].—(16) The owner or person

(b) *Warrant to Inspect*.—If it shall appear, on oath, that there is reasonable ground to suspect and believe that any sheep, &c., are slaughtered in any shop, &c., in violation of any law relating to slaughter-houses, any Justice may grant his warrant, authorizing any Inspector or constable to inspect premises, and ascertain whether the provisions of Slaughter-house Acts are violated.

(c) *Neglecting to destroy Animals*.—By s. 13, where person whose duty it is to destroy, &c., refuses or neglects to perform that duty, the Inspector of Nuisances or a constable may enter upon land, and cause such animal to be destroyed; the costs whereof are recoverable as penalties under the Act.

(d) *Entry on Premises*.—By s. 10, Any Inspector of Nuisances, Inspector, or Sergeant of Police may enter upon any premises or place within the city of Sydney, at any hour, with assistants, where any animal has died of disease, and require the owner or occupier thereof immediately to remove such animal one mile beyond the limits of the said city, to be destroyed by fire; and, in default, any one or more of such officers may cause such animal to be removed for such purpose at the owner's cost,—such cost to be recovered as penalties are recoverable under

in charge of any animal dying upon any road or public place in the colony, (except in Sydney, see ss. 10 & 12), not immediately causing such animal to be destroyed by fire on the spot.

P. Fine not exc. £10. If not paid, impr. not exc. 12 mths. (S. 18).

S. 14 Vic., No. 30, s. 2. (E) [*Two Justices*].—(17) Any person slaughtering (F), skinning, scalding, or dressing, or causing to be slaughtered, skinned, scalded, or dressed, any animal (G), in any house or place within the limits or reputed limits of any city or town to which the provisions of this Act extend, other than licensed slaughter-houses. (H) (I) (K)

P. Fine not exc. £10: to be recovered either by distress, under s. 19 of Jervis's Act; or according to the procedure of 5 W. IV., No. 22. See "Justices, Recovery of Fines," where s. 1 of 5 W. IV., No. 22, is given at length. See also "Abattoir," ante, p. 1, and *ex parte* Cockburn, post, Part III.

S. Id., s. 4. [*Two Justices*].—(18) Any blood-boiler, bone-boiler, fellmonger, slaughterer of horses, or boiler or steamer of animals or parts of animals, for extracting the tallow or fat therefrom, carrying on such business within the limits of any such town as aforesaid. Notes (E) (F) (G)

P. Fine not exc. £50, and also £2 for each day during which the offence is continued: to be recovered as offence (17).

S. Id., s. 5. [*Two Justices*].—(19) Any person newly establishing, or continuing, or carrying on the business of a soapboiler, tallow-melter, tripe-boiler, tanner, or currier, or any other trade or manufacture of an obnoxious or unwholesome nature, in any building or place within the limits or reputed limits of any such town as aforesaid. Notes (E) (F) (G)

this Act. For regulations exclusively applicable to Sydney, see 13 Vic., No. 42; 14 Vic., No. 36.

(E) 14 Vic., No. 30, s. 1].—No house or premises situated within the limits of any city or town to which this Act may be extended, or within one mile from the limits of such town, &c., shall be licensed as a slaughter-house; and, by s. 3, after the expiration of five years next after the extension of this Act to any city, &c., no license shall be issued or renewed for any slaughter-houses, &c., which, at the date of such extension, may have been licensed within the limits of such city, &c., or within one mile therefrom. To obtain such extension, s. 14 *et seq.* provide for the calling of a meeting of inhabitants of such town, upon the application of twenty-five inhabitants; for the voting at such meeting; and for the communicating to the Colonial Secretary of the decision of the meeting. The Governor then, by proclamation, extends the provisions of this Act to such town, and declares the limits of the same.

(F) *Evidence*.—The finding of any animal on the premises of any butcher, or other person, under circumstances denoting an intention of slaughtering such animal, is evidence of slaughtering, unless otherwise disproved by the accused. (S. 12).

(G) "Animal" includes horse, mare, gelding, colt, filly, ass, mule, bull, cow, ox, heifer, steer, calf, ram, ewe, sheep, lamb, goat, and pig, (s. 20); and "slaughter-house" shall include boiling-down establishments.

(H) *Limitation of Prosecutions*.—No prosecution, &c., shall be brought under this Act after the lapse of three months from the occurrence of the matter or thing to which such prosecution, &c., may relate. (S. 24).

As to meaning of this section, (s. 2), see *Elias v. Nightingale*, 27 L.J.M.C., 151).

(I) *Appeal*.—Appeal allowed according to 5 W. IV., No. 22. (See "Appeal.") Proceedings by summons permitted, although no information in writing be exhibited. (S. 25).

(K) *Appropriation of Fines*.—One moiety to Her Majesty, and the other to the Informer, who is entitled to his costs and charges over and above such fine. (S. 28).

P. Fine not exc. £50, and also £2 for each day's continuance : to be recovered as offence (17).

N.B.—*The Justices are to determine whether any trade or manufacture is obnoxious or unwholesome. If the offender discontinue his offence within six months after receipt of notice in writing, he shall not be liable to the penalty, unless he shall again renew or re-establish the same.* (S. 6).

S. 14 Vic., No. 30, s. 7. (L) [*Two Justices*].—(20) The owner or occupier of any shop, &c., used for the sale of butchers' meat, or as a slaughter-house, or any place used for carrying on the business of a soap-boiler, tallow-melter, tripe-boiler, tanner, or currier, &c., or premises occupied with the same, or appurtenant thereto, having received notice, (M) in writing, from two Justices to whitewash, cleanse, or purify the said premises, and failing to comply therewith within the time specified in such notice.

P. Fine not exc. £10 for every day which he continues to make default : to be recovered as offence (17).

S. 14 Vic., No. 30, s. 10. [*One Justice*].—(21) Any person to whom any animal (Note G) carcass, meat, or flesh, which shall appear to the Inspector, &c., (N) to be intended for the food of mankind, and which is unfit for such food, belongs, or in whose custody the same is found. (Note H)

P. Fine not exc. £10 for every animal carcass, piece of meat, or flesh so found : to be recovered as offence (17).

S. *Id.*, s. 11. [*Two Justices*].—(22) Any owner or occupier of any slaughter-house neglecting to wash and cleanse such slaughter-house within the limits of such city or town, within one hour after the slaughtering of any animal, or to remove once, at least, in every twenty-four hours, the blood, offal, and filth of all such animals.

P. Fine not exc. £10 : to be recovered as offence (17).

M. 5 W. IV., No. 1, s. 12. *Bail comp.*—(1) Obstructing or hindering any Justice, Inspector, or constable, so as to prevent them from entering

(L) *Search Warrant*.—When it shall be made to appear, on oath, to any Justice that there is reasonable ground for believing such shop, &c., is in a filthy, &c., condition, he may grant a warrant to any Inspector of Slaughter-houses, or any Inspector of Police, or Chief Constable, with necessary assistance, to enter such shop, &c., and view its condition. (s. 8); and the Justices may cause slaughter-houses, &c., to be whitewashed, cleansed, and purified; the expense whereof is to be recovered like a fine.

(M) Upon the certificate of two legally qualified medical practitioners, verified on oath, two Justices may give notice, in writing, to the owner or occupier to cleanse buildings, &c.; and this notice can be served by affixing a copy thereof on a conspicuous part of the premises, &c., to be cleansed. (S. 7).

(N) *Police may inspect and seize*.—By s. 10, any Inspector or Chief Constable of the Police force of such city or town (Note B), may, at reasonable times, enter and inspect any shop, &c., kept for sale of butchers' meat, or as a slaughter-house, and may examine any animal carcass, meat, or flesh which may be therein; and in case any animal, &c., appear to him to be intended for the food of mankind, and to be unfit for such food, the same may be seized; and if it appear to a Justice, upon the evidence of a competent person, that any such animal, &c., is unfit for the food of man, he shall order the same to be destroyed, or to be so disposed of as to prevent its being exposed for sale or used for such food; and the person to whom such animal, &c., belongs, or in whose custody the same is found, shall be liable to a penalty not exceeding £10 for every animal, &c., so found.

any licensed premises at any time for purpose of examining any cattle or skin.

P. Fine or impr., or both.

M. 15 Vic., No. 13, s. 5. (o) *Bail comp.*—(2) Knowingly taking, or assisting in taking, into any slaughter-house used for slaughter of animals intended for human food, any animal, or part of any animal, which has died of any disease.

P. Impr. not exc. 2 yrs., with or without h.l.

M. *Id.*, s. 7. *Bail comp.*—(3) Knowingly selling or exposing for sale any animal, or portion of any animal, which has died of any disease, or the melt or spleen of which shall have been diseased.

P. Impr. not exc. 2 years, with or without h.l.

BY-LAWS.

See "RAILWAY," "MARKET."

CARNALLY KNOWING FEMALE CHILDREN.

See "ASSAULT," "ATTEMPT," and "RAPE."

F. 9 G. IV., c. 31, s. 17. *Bail disc.*—(1) Unlawfully and carnally know and abuse any girl under the age of ten years.

P. Death. (p)

M. *Id.* *Bail comp.*—(2) The like, any girl, being above the age of ten, and under the age of twelve.

P. Impr., with or without h.l., for such term as Court shall award; or Tr. 10—5 yrs., (11 Vic., No. 30, s. 3); or 10—3 yrs. h.l. on roads, (if 11 Vic., No. 34, s. 1, applies; *sed quære*). (q)

N.B.—*The precise age of the child should be proved. Where the child, from her tender age, was incompetent to be sworn, evidence of what she stated to her mother shortly after the alleged offence, is inadmissible, nor can the mother prove that the child mentioned any particular person.* (2 C. & K., 246).

M. 11 Vic., No. 30, s. 4. *Bail comp.*—(3) Unlawfully and indecently assaulting any female child under the age of twelve years, whether such assault be with or without the consent of such child.

P. H. l. on roads for not exc. 3 yrs.; if such offender be a transported felon, Court may direct the said labour to be performed in irons.

(o) Victuallers, brewers, and other common dealers in victuals, who sell in the course of their trade provisions unfit for food, are criminally responsible. (See *Burnaby v. Bollett*, 16 M. & W., 644).

(p) By s. 2 of 11 Vic., No. 30. Where any person shall be tried on an information or indictment, charging him with the commission of the crime of rape, or with having unlawfully and carnally known and abused a girl under the age of ten years, the jury may acquit him of the capital charge, and find a verdict against him, (if the evidence shall warrant such finding), of guilty of assault with intent to commit the same; and such person shall be deemed to be convicted within s. 1 of 11 Vic., No. 30; and such verdict may be found in respect of a girl under ten, even although she consent.—Punishment. Tr. 15—7 years; or 10—5 years on the roads, and irons for first 3 years.

(q) By s. 3 of 11 Vic., No. 30. On any indictment or information for unlawfully and carnally knowing and abusing a girl above ten, and under twelve, the jury may acquit him of the same, and find a verdict against him of guilty of an attempt to commit the offence.—Punishment: Hard labour, with or without imprisonment (*sic*) for not exc. 3 years.

CARRIAGES—LICENSED.

See "TOLLS."

S. 6 W. IV., No. 2, s. 5. [*One Justice*].—(1) Any person neglecting or omitting, in his requisition for a license under this Act for or in respect of any stage-carriage, (R) (s), to specify truly and set forth the Christian and surname, and place of abode, of the person applying for such license, and of every person who shall be a proprietor or part-proprietor of such carriage, or who shall be concerned, either solely or in partnership with any other person, in the keeping, using, or employing of such carriage.

P. Fine £10: to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22. (See "*Justices, Recovery of Fines*," *post*, where s. 1 of 5 W. IV., No. 22, is given at length; and *ex parte* Cockburn, *post*, Part III.) (T) (U) (V) (W)

(R) *Stage Carriage*.—By s. 2, Every coach, or other carriage or vehicle, used, employed, or let out for the purpose of conveying passengers for hire, and which shall travel at the rate of three miles or more in the hour, without regard to the number of wheels, or the number of passengers which the same shall be able to carry, or the number of horses by which the same may be drawn, or to its being an open or close carriage, shall be deemed and taken to be a stage-carriage within the meaning of this Act: Provided that each passenger to be carried by any such carriage shall be charged a separate fare for his or her seat therein, or conveyance thereby.

(s) *License*.—By s. 3, Any two Justices in Petty Sessions for any district from or through which any stage-carriage may be intended to pass, may grant a license under their hands (see Forms, *post*, Part II.) to any applicant for the same, to keep and employ any stage-carriage.

By s. 4, Before any such license shall be granted, the stage-carriage to be licensed shall be exhibited to the Justices to whom application shall be made, at the usual time and place of holding the Petty Sessions; and such Justices, on examination of such carriage, may determine the number of passengers which may be safely and conveniently carried, both inside and outside: Provided that such number shall not exceed the number limited and defined by s. 12; the applicant for a license to sign a requisition. (See *supra*, offences (1).)

By s. 6, A copy of every license granted or renewed under this Act shall be kept at the office or place whence it shall be issued, that any person may have a copy thereof, on payment of 1s.

By s. 7, Every license granted under this Act shall continue in force from the date thereof till the 30th day of September then next ensuing, unless granted or renewed in the month of September, when it shall be in force till the 30th day of September in the year then next ensuing; and every such license shall be renewed from year to year, and, whenever any change shall occur in the proprietary, subject to the regulations provided with respect to the granting of original licenses.

By s. 8, The Clerks of Petty Sessions where such licenses shall be issued shall charge to the applicants for the same the sum of 5s. for each license, which, together with any sum received for a copy of the same, (see s. 6), shall be paid and accounted for, and returns made thereof, as is directed with respect to fees levied under 4 W. IV., No. 5. (See *post*, "*Fees*").

(T) *Appeal*.—By s. 21, Appeal allowed when penalty awarded shall exceed £5. (See "*Appeal*," *ante*, p. 7).

(U) *Service of Summons*.—By s. 22, Any summons issued, commanding the appearance of any driver, conductor, guard, or stage-carriage proprietor, or any person or firm of any company to whom such carriage shall belong, for any offence under this Act, shall be well and sufficiently served if either the original or a copy of such summons be left with the known or acting book-keeper for such carriage, in any town or place into or through which such carriage shall be driven.

S. Id., s. 9. [*One Justice*].—(2) Any person keeping, using, or employing, or being concerned, as proprietor or part-proprietor, in the keeping, using, or employing, of any stage-carriage, without having a license in force so to do, granted under this Act.

P. Fine £20 : to be recovered as offence (1).

S. Id., s. 10. [*One Justice*].—(3) Any person using or employing any stage-carriage, upon which all such particulars as required (*vide Act*, s. 10) shall not be truly painted in such legible and conspicuous letters, and in manner as required; or, in case of such particulars, or any of them, being partially obliterated or defaced from or upon any such carriage, any such person neglecting to paint or cause to be painted again in manner aforesaid every particular so obliterated or defaced.

P. Fine £5 : to be recovered as offence (1).

S. Id., s. 11. [*One Justice*].—(4) Any outside passenger or luggage being carried on the top or roof of any stage-carriage, the top or roof of which from the ground shall be more than eight feet nine inches, or the bearing of which on the ground shall be less than four feet six inches from the centre of the track of the right or off wheel to the centre of the track of the left or near wheel.

P. Fine £5 by driver, (x) : to be recovered as offence (1).

S. Id., s. 12. [*One Justice*].—(5) Carrying any greater number of outside passengers by any licensed stage-carriage than as specified and allowed, (see s. 12); or carrying any outside passengers by any stage-carriage not expressly licensed to carry outside passengers. (y)

(v) *Information against nearest Proprietor*.—By s. 23, All summonses, informations, and convictions under this Act, for the recovery of any penalty, where there shall be more than one proprietor, and the proprietors shall reside in different places, shall be issued, laid, or prosecuted against such one or more of the said proprietors as shall reside in or nearest to the place where such summons shall be issued.

(w) *Limitation of Actions*.—All prosecutions for offences against this Act shall be commenced within fourteen days after the offence shall have been committed, and there shall be but one recovery for the same offence, except where the owners of stage-carriages are required to paint their names and the number of passengers which they may be licensed to carry, and to preserve the same in a clear and legible state; in which case such prosecution shall be commenced at any time, and any neglect in remedying the same for the space of one month shall be considered a new offence. (S. 25).

(x) *Owners Liable*.—By s. 20, Whenever any penalty is, by this Act, imposed for any offence upon the driver, conductor, or guard of any stage-carriage, and not upon the proprietor thereof, and such driver, &c., shall not be known or cannot be found, then the proprietor shall be liable to every such penalty: Provided that, if such proprietor shall make out to the satisfaction of the Justice before whom any complaint or information shall be heard, by sufficient evidence, not resting on his own testimony, that the offence was committed by such driver, &c., without the privity or knowledge of such proprietor, and that no profit, advantage, or benefit, either directly or indirectly, has accrued or can accrue to such proprietor therefrom, and that he has used his endeavour to find out such driver, &c., and given all reasonable information in answer to inquiries respecting him, such Justice shall discharge the proprietor from such penalty, and shall levy the same upon such driver, or conductor, or guard, when found.

(y) *Outside Passengers*.—By s. 13, The number of outside passengers by this Act allowed to be carried by any stage-carriage shall be exclusive of the driver, but including the conductor or guard, (if any); and no child in the lap shall be

P. Fine £5 by driver, (Note x) : to be recovered as offence (1).

S. Id., s. 14. [One Justice].—(6) Any luggage being carried on the top or roof of any stage-carriage drawn by four or more horses, and exceeding ten feet nine inches in height from the ground; or such luggage being carried on the top or roof of any stage-carriage drawn by two or three horses only, and exceeding ten feet three inches in height from the ground, measuring to the highest point of any part of such luggage when placed on the roof of any such carriages respectively.

P. Fine £5 by driver, (Note x) : to be recovered as offence (1).

S. Id., s. 15. [One Justice].—(7) Any person being allowed to sit or be carried upon any luggage placed on the roof of any stage-carriage; or more than one passenger or other person, besides the driver, being allowed to sit or be carried upon the box with the driver of such carriage.

P. Fine £5 by driver, (Note x) : to be recovered as offence (1).

S. Id., s. 16. [One Justice].—(8) The number of passengers at any one time conveyed in, upon, or about any licensed stage-carriage exceeding in the whole the number of passengers authorized by the license to be conveyed thereby; or the number of inside or outside passengers at any one time conveyed in the inside of such carriage, or upon or about the outside thereof, exceeding the greatest number of inside or outside passengers respectively specified in and allowed by such license.

P. Fine, by grantee of license, £5 for every passenger so conveyed above allowed number, and also Fine £5 by driver. The fines to be recovered as offence (1).

S. Id., s. 17. [One Justice].—(9) The driver of any stage-carriage within the meaning of this Act refusing, upon the demand of any inside or outside passenger who has actually paid for his place, and is conveyed by such carriage, to stop such carriage at any toll or turnpike-gate, or to permit the collector who shall be so required, to count the number of passengers, or to measure or ascertain the height of the luggage, or to make such examination.

P. Fine £5; and also, if more passengers carried than, or luggage exceed height, allowed by Act, forfeit double penalty imposed for every such offence: to be recovered as offence (1).

S. Id. [One Justice].—(10) Any toll-collector, on being so required by any such passenger, neglecting or refusing to make such examination.

P. Fine £5: to be recovered as offence (1).

S. Id. [One Justice].—(11) Any person endeavouring to evade such examination, by descending from such stage-carriage previous to reaching any turnpike-gate, and re-ascending after passing the same.

P. Fine £10: to be recovered as offence (1).

S. Id., s. 18. [One Justice].—(12) The driver of any stage-carriage drawn by three or more horses, at any place where such carriage shall stop, quitting the box of such carriage, or the horses drawing the same, without delivering the reins into the hands of some fit person, or before some fit person shall be placed and shall stand at the horses' heads, and

counted a passenger; nor any child not in the lap, but under seven years of age, unless there be more than one, and then two of such children shall be considered as one passenger, and so on in the same proportion.

shall have the command thereof,—or such person, so placed and standing at the heads of such horses, leaving such horses before some other proper person shall be placed and stand in like manner, and have the command of such horses, or before the driver shall have returned and seated himself upon the box, and taken the reins,—or such driver permitting any passenger or person other than himself to drive the horses drawing such carriage,—or such driver quitting the box without reasonable occasion, or for longer time than such occasion shall absolutely require,—or any guard to any such carriage, whilst the horses are harnessed, or in the act of being harnessed, to such carriage, and whilst any passenger shall be in, upon, or about the same, discharging any firearms, except for necessary defence of such carriage, or of the passengers or luggage being in or about the same,—or the driver, or conductor, or guard of such carriage neglecting to take due care of any luggage carried or to be carried by such carriage, or demanding or receiving for the fare of any passenger more than the sum which he shall be liable to pay, or more than the money properly chargeable for the carriage of any luggage; or, when thereto required, neglecting or refusing faithfully to account to his employer for all moneys received by him in respect of any passenger or luggage carried by such carriage; or assaulting or using abusive or insulting language to any person travelling, or about to travel, or having travelled, as a passenger by such carriage, or to any person accompanying or attending upon such passenger in coming to or going from such carriage.

P. Fine £5: to be recovered as offence (1).

S. *Id.*, s. 19. [*One Justice*].—(13) The driver, conductor, or guard of any stage-carriage, or any other person having the care thereof, or employed in or upon such carriage, through intoxication or negligence, or by wanton or furious driving, or by or through any other misconduct, endangering the safety of any passenger or other person, or injuring and endangering the property of the owner or proprietor of such stage-carriage, or of any other person.

P. Fine £5: to be recovered as offence (1). Notes (T) (U) (V) (W)

M. 13 *Vic.*, No. 5, s. 1. *Bail comp.*—If any person whatever shall be maimed, or otherwise injured, by reason of the careless or furious driving, or of the racing or other wilful misconduct, of any coachman or other person driving any stage-coach or other public carriage carrying passengers for hire, such careless or furious driving, or racing, or other wilful misconduct, &c., is misdemeanor.

P. Fine and impr.

CARRIERS.

See "LARCENY," "SUNDAY."

F. 22 *Vic.*, No. 9. *Bail disc.*—Any person, being a bailee (z) of

(z) Bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. (*Story on "Bailments,"* p. 4). Two ingredients are essentially necessary to

goods or chattels, with intent to defraud, converting such goods or chattels, or any part thereof, to his own use, or the use of any person other than the owner thereof, is guilty of larceny.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 5—3 yrs.

N.B.—*S. c. never to exceed three lunar mths. in one year.* (1 Vic., c. 90, s. 5).

CARTER—LICENSED (IN SYDNEY).

18 Vic., No. 28.—As the operations of this Act are limited to Sydney or eight miles therefrom, it is considered sufficient to make this general reference to it.

CATTLE.

See "ABATTOIR," "ANIMALS," "BUTCHER," "LARCENY."

1. CATTLE DRIVING.

S. 16 Vic., No. 23, s. 1. [*One Justice*].—*Cattle Driving*.—Any person driving, or causing to be driven, any cattle intended for sale, slaughter, or shipment, into or through any part of such towns or places to which the Governor shall have decided and notified in the *Gazette* that this Act shall apply, at any other hour except between the hours of 6 p. m. and 8 a. m.

P. Fine not exc. £1 a head: to be recovered either by distress, (11 & 12 Vic., c. 43, s. 19); or according to procedure of 5 W. IV., No. 22. (A)

N.B.—"*Cattle*" includes bulls, cows, oxen, heifers, and steers; but not milch cows, cattle in teams, or working cattle. (S. 2).

2. CATTLE STEALING.

S. 17 Vic., No. 3, s. 6. (B) [*Two Justices*].—*Cattle Stealing*.—(1) Any person taking, using, or in any manner working any cattle (c) the

constitute a bailment: 1, a delivery; and, 2, a trust; this latter word being used to signify the confidence one man reposes in another. This Act (22 Vic., No. 9) was passed in order to get rid of the difficulty of convicting of larceny where there is no fraudulent intention in the first instance,—where the goods were not obtained *animo furandi*. (See Arch. Cr. Pl., 273, and "*Larceny*," *post*). In *R. v. Curran the younger*, (a case reserved, decided April 10th, 1860), it was held by the full Court that a prisoner might be convicted under this Act, although the indictment was for simple larceny,—that a simple indictment for larceny, sustained by evidence of such a conversion, was sufficient to support a conviction.

(A) *Recovery of Penalty*.—No power of distress or imprisonment being given by the statute creating the offence,—see Note to "*Abattoir*," *ante*, p. 1, and "*Justices, Mode of Recovery*," *post*, and *ex parte Cockburn*, *post*, Part III.

(B) *Procedure*.—No information in writing is necessary previous to the issuing of a summons; and in any information, summons, warrant, conviction, commitment, or other proceeding for any offence contrary to this Act, it shall be sufficient if the offence be stated in the words thereof, declaring the offence; and the Justices may amend any proceedings before them on such terms as they shall think fit. (S. 10).

(C) By s. 8, if the Justices before whom any person shall be brought under this Act, charged with the offence of working another person's cattle, shall, from the evidence given against such person, be of opinion that there ought to be a pro-

property of any other person, without the consent of the owner or other person in lawful possession thereof.

P. Forfeit for every head of cattle so used not exc. £20, together with costs, to be assessed by such Justices; or, at the discretion of such Justices, impr., with or without h. l., not exc. 12 mths.—If the fine adjudged be not paid either immediately or within such period appointed by the Justices at the time of conviction, impr., with or without h. l., for not exc. 3 mths. where sum remaining unpaid shall not exc. £10; 4 mths. where said sum shall exc. £10, but not exc. £20; and 6 mths. where said sum shall exc. £20, unless the same be sooner paid, (s. 9). (11 & 12 Vic., c. 43, s. 23).

N.B.—*If any person convicted under this section (s. 6) shall have paid the sum adjudged to be paid, together with costs, if awarded, or shall have received a remission thereof from the Crown, or shall have suffered the imprisonment awarded for the non-payment thereof, he shall be released from all further proceedings for the same cause.* (S. 7).

S. *Id.*, s. 5. [Two Justices].—(2) Any person in whose possession, at or in any dwelling-house or other place, is found any skin or carcass, or any part thereof, of any stolen cattle, being unable to satisfy Justices sitting in Petty Sessions in open Court, that he came lawfully thereby.

P. Fine not exc. £50, together with the charges previous to and attending the conviction; (see, *infra*, this section (s. 5) given at length). Fine to be recovered as offence (1).

F. 7 & 8 Geo. IV., c. 29, s. 25. *Bail disc.*—(1) Stealing any horse, mare, gelding, colt, or filly; or any bull, cow, ox, heifer, or calf; or any ram, ewe, sheep, or lamb; or wilfully killing the same with intent to steal the carcass or skin, or any part thereof.

P. Tr. 15—10 yrs.; or impr. not exc. 3 yrs., with h. l. and s. c.; or (*if male*) h. l. on roads 10—5 yrs. (D)

F. 7 & 8 Geo. IV., c. 30, s. 16. *Bail disc.*—(2) Maliciously killing, maiming, or wounding any cattle.

P. The same.

17 Vic., No. 3., s. 3.—*Restitution of stolen Cattle may be awarded*.—Any Justice of the Peace, upon complaint or information, on oath, that any cattle (E) suspected to have been stolen is in the possession of any

secution for felony, such Justices may abstain from adjudicating in a summary manner thereon, and may deal with the case as one to be prosecuted at the Supreme or Circuit Court, or Court of General Sessions.

(D) *Offender may be convicted under s. 6 of 17 Vic., No. 3.*—If the jury, upon the trial of any person charged before any Court with the offence of stealing any cattle, shall be of opinion that such person did not commit the felony with which he is charged, but did commit the misdemeanor of taking, using, or working any other person's cattle, (punishable summarily by 17 Vic., No. 3, s. 6), such jury may acquit such person of the felony, and may find him guilty of such misdemeanor, and he shall thereupon receive sentence accordingly, although such person may never have been charged or accused of such misdemeanor before any Justices or otherwise. (17 Vic., No. 3, s. 8. See *supra*).

(E) By s. 2, the word "cattle" shall extend to and include horses, mares, fillies, foals, geldings, colts; bulls, bullocks, cows, heifers, steers, calves; sheep, lambs; goats, pigs, mules, and asses. The word "vendor" shall include and mean the auctioneer or other agent of such vendor as well as such vendor himself.

person, may issue a summons to such person, requiring him to appear at a time and place mentioned in such summons, before any two Justices of the Peace; or, in the discretion of such Justice, may issue a warrant in the first instance to apprehend and bring such person, at a time and place mentioned in such warrant, before any two Justices of the Peace; and also, if such Justice shall think fit, may issue his warrant to any constable, commanding him to seize any such cattle suspected to have been stolen, and detain the same until such information or complaint shall have been disposed of; and if, on the appearance of such person, so summoned or apprehended, or on proof of the service of such summons personally, or by leaving the same at the usual or last known place of abode of such person, two days before he was required to appear, it shall seem to such Justices, after hearing evidence, on oath or affirmation, that such cattle were stolen within the period of one year preceding from the person making complaint or laying the information, it shall be lawful for such Justices to adjudge him to be the owner of such cattle, and to issue a warrant under their hands and seals to any constable of the said colony, commanding him forthwith to seize such cattle wheresoever the same may be found, and to restore and give peaceable possession thereof to the person so adjudged to be the owner, as aforesaid: Provided always that nothing herein contained shall be construed or taken to discharge any person from any criminal prosecution for felony to be afterwards brought against such person, or to prevent the Justices committing such person for trial, or to deprive any person of any right he may have or might have had before the passing hereof.

Id., s. 4.—*Vendee who delivers cattle, or pays back sum received, may recover from his vendor*].—Any person from whom or from whose possession any cattle shall have been taken, under any such warrant as last aforesaid, may recover from his vendor the amount paid by him as the purchase-money of such cattle; and any vendor of such cattle who may repay or be compelled to repay the purchase-money he may have received for such cattle, may in like manner recover back from his vendor the amount he may have paid such last-mentioned vendor as the purchase-money of such cattle; and it shall be lawful for any Justice of the Peace, upon complaint, on oath, made by any such person or vendor as aforesaid, or any person on his behalf, that such person or vendor has paid for such cattle, and that such cattle have been taken from him, or that he has paid or been compelled to repay the amount he received, to summon the party selling to such last-mentioned person or vendor to appear before any two Justices of the Peace, or to issue his warrant for the apprehension of such party selling; and upon his appearance, or, in default thereof, upon proof of the due service of such summons, such Justices are hereby empowered to examine the parties, or either of them, and their respective witnesses, (if there be any), upon oath, touching the purchase and payment of the amount of the purchase-money for such cattle, and the restitution of the cattle purchased by such complainant, or the repayment of the sum received by him, and to make such order for the repayment of that amount, with the costs incurred in the recovery thereof, as shall to such Justices appear reasonable; and in case such amount shall not be paid forthwith, or at the time to be appointed by such Justices, the same shall be levied

by distress and sale of the goods and chattels of the party on whom such order for payment shall be made ; and if such distress cannot be made, or shall prove insufficient, such Justices are hereby empowered to cause the party upon whom the order shall be made to be apprehended and committed to any gaol or house of correction, there to remain for any period not exceeding three months, unless payment of the said amount, and of all costs and expenses attending the recovery thereof, shall be sooner made : Provided that the execution of such order shall be stayed for such time as such Justices may order, if the person from whom, or from whose possession, such cattle may have been taken, or on whom such order for payment shall be made, shall forthwith enter into a bond to the complainant, with two sufficient sureties, to the satisfaction of such Justices, and in such amount as they shall think reasonable, conditioned to prosecute to conviction, within the time aforesaid, the person guilty of having stolen such cattle ; and such conviction within the time aforesaid shall supersede the order so made by such Justices as aforesaid ; and no subsequent proceedings shall be had thereon or upon the said bond : Provided also that it shall be lawful for such Justices, on the application of such party, and notice to the said complainant, to extend the time aforesaid.

S. 5. Search Warrant.—If any witness shall prove on oath before a Justice of the Peace, that there is reasonable cause to suspect that the skin or carcass, or any parts of the skin or carcass, of any cattle stolen from any person, is concealed in any dwelling-house or other place, it shall be lawful for such Justice to issue a warrant, directing any constable to search such dwelling-house or place ; and, if the skin or carcass of any cattle, or any part of any such skin or carcass, so suspected to have been stolen, shall be found in the possession of any person in or at such dwelling-house or other place specified in such warrant, with his knowledge, it shall be lawful for any Justice before whom such person shall be brought, (unless such person shall satisfy the said Justice that he came lawfully by the same), to commit such person to the nearest gaol or lock-up in which he can be conveniently confined, in order that he may be brought forward for trial at the next Court of Petty Sessions, (unless he enter into such bail, with one or more sufficient securities, as may be required for his appearance before such Court, which any Justice is hereby authorized and required to take) ; and if such person so apprehended, after proof upon oath of such finding of such skin or carcass, or any part thereof, as aforesaid, shall not satisfy the Justices sitting at Petty Sessions in open Court, that he came lawfully thereby, he shall forfeit and pay any sum not exceeding fifty pounds, together with the charges previous to and attending his conviction. If not paid immediately, or within such period after the conviction as such Justices at the time of such conviction shall appoint, such Justices shall commit the offender, with or without h. l., for not exc. 3 mths. where the sum remaining unpaid shall not exceed £10 ; 4 mths. where the said sum shall exceed £10, and not exceed £20 ; and 6 mths. where the said sum shall exceed £20 ; unless the said sums shall be sooner paid. (S. 9). As to Procedure, see *supra*, Note (b) to offence of working another's cattle.

CERTIORARI.
See "APPEAL."

CHALLENGE.

M. at Com. Law. Bail comp.—Provoking to fight or sending a challenge,—sending a challenge,—or taking the same.

P. Fine or impr., or both. (*R. v. Phillips*, 6 East, 464).

CHEATING.

See "CONSPIRACIES," "FALSE PRETENCES," and "GAMING."

To constitute Cheating, a mere false representation is not sufficient: that would be obtaining money under false pretences. There must be a plausible contrivance, as by false weights, against which the ordinary prudence of individuals is no security.

If a man in the course of his trade, openly carried on, puts a false mark or token upon a spurious article, so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is guilty of a cheat at Common Law. (*R. v. Close*, 3 Jur. N. S., 1309).

M. at Com. Law. Bail comp.—Selling by false weights, &c.

P. Fine and impr., with h. l. (16 Vic., No. 18, s. 29).

CHILD-MURDER.

See "CONCEALING BIRTH."

CHILDREN. (F)

See "APPRENTICE," "BASTARD," "JUVENILE OFFENDERS," and "WIVES."

M. 22 Vic., No. 6. Bail comp.—(1) *Child-desertion*.—Any parent wilfully and without lawful or reasonable cause or excuse, deserting any of his children under the age of sixteen, and leaving such child without means of support,—such parent being able to maintain such child.

P. Impr. not exc. 12 cal. m.

F. 9 G. IV., c. 31, s. 21. Bail disc.—(2) *Child-stealing*.—By force or fraud, taking or decoying away, &c., any child under ten years of age, with intent to steal apparel, &c.; or knowingly receiving or harbouring such child.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l. and w.; or (*if male*) h. l. on roads 5—3 yrs.

CHLOROFORM.

See "ATTEMPTS."

(F) *Legitimate and Illegitimate Children*.—As the statutable provisions for the protection and redress of *deserted children* seem to be the same, whether the children are legitimate or not, it has been thought sufficient to give the subject in detail under title "*Bastard*." (*Sec. ante*, p. 39).

CHURCH.

See "MALICIOUS INJURIES."

*S. 1 M., c. 3, s. 2. (g) [Two Justices].—(1) Disturbing].—*Any person or persons willingly and of purpose, by open and overt word, fact, act, or deed, maliciously or contemptuously molesting, letting, disturbing, vexing, or troubling, or by any other unlawful ways or means disquieting or misusing any preacher in any of his open sermons, &c., in any church, chapel, churchyard, &c.

P. Impr. for 3 mths., without bail or mainprize, and further to the Quarter Sessions next after the said 3 mths., at which surety for good behaviour for one whole year may be required.

N.B.—The conviction must be by "two sufficient witnesses," or by the confession of the offender.

S. Id., s. 3. [Two Justices].—(2) Maliciously, willingly, or of purpose, molesting, letting, disturbing, vexing, disquieting, or otherwise troubling, any parson, vicar, &c., celebrating divine service, sacraments, &c., [including the present Common Form of Prayer, (1 Hawk, 140)].

P. The same.

S. Id., s. 4. [Two Justices].—(3) Aiding, procuring, or abetting offence.

P. The same.

S. Id., s. 7. [Two Justices].—(4) Persons willingly and unlawfully rescuing offenders apprehended, or hindering them from being apprehended.

P. The like impr., and further, a fine of £5, (s. 7): to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to procedure of 5 W. IV., No. 22. See "Abattoir," ante, p. 1, and "Justices, Recovery of Fines," post; and ex parte Cockburn, post, Part III.

M. 1 W. & M., c. 18, s. 18. (H) Bail comp.—(1) Disquieting or disturbing, or misusing, any preacher or teacher of any congregation, in any cathedral or parish church, chapel, or other congregation permitted by the Toleration Act.

P. Fine of £20 on each offender.

M. 52 G. III., c. 155, s. 12. (i) Bail comp.—(2) The like offence, Dissenters, [Roman Catholics, 31 G. III., c. 33, s. 10].

(g) Mr. Arnold, (*Summary Convictions*, p. 480), has suggested that this statute is inapplicable to the Established Church in England. See 1 Russell on Cr. & Ms., 301, and *Williams v. Glenister*. (2 B & C., 599).

It has been thought advisable to give these statutes, although it is extremely questionable whether they can be considered to be in force in this Colony. See the case of *in re Ryan v. the Ipswich Bench*, decided July, 1855, where it was held by the full Court that 5 & 6 Edw. VI., c. 3, which prescribes the observance of certain church festivals, &c., was not in force.

(H) *Mode of Proceeding].—*By 1 W. & M., c. 18, s. 18, and 52 G. III., c. 155, s. 12, on proof of the offence committed either in a church or a dissenting chapel, before any Justice, by two or more credible witnesses, the offender is to find two sureties, to be bound by recognizances in the penal sum of £50, to answer for the offence; and, in default, to be committed to prison till the next General or Quarter Sessions. The depositions should be taken in the ordinary way, and transmitted with the prosecutor's recognizance.

(i) 52 G. III., c. 155, does not apply to churches, &c., of the Church of England. (*Carr v. Marsh*, 2 Phill., 203).

P. Fine £40 on each offender, except Roman Catholic congregations, and then £20.

M. at Com. Law. Bail comp.—(3). The like at Common Law, (and see 2 & 3 Edw. VI., c. 1, s. 2; 1 Eliz., c. 2, s. 9).

P. Fine and impr., or both.

CLERGYMEN.

M. 9 G. IV., c. 31, s. 23. Bail comp.—Arresting on way to or during the service.

P. Fine or impr., or both.

CLERK.

See "EMBEZZLEMENT," "LARCENY."

CLERK OF PETTY SESSIONS.

See "FEES," "FINES."

COAL AND COLLIERIES.

The Acts regulating the sale of coals in Sydney and its vicinity are 9 Vic., No. 8, and 10 Vic., No. 2.

S. 18 Vic., No. 32, s. 4. [Two Justices].—Every owner or agent (κ) of any coal mine or colliery refusing to the Examiner of Coal Mines the means necessary for making, at all reasonable times, any entry, inspection, examination, or inquiry, under this Act;—or wilfully obstructing any such Examiner in the execution of this Act.

P. Fine £20—£10 : to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22). See "Abattoir," p. 1, and "Justices, Recovery of Fines," *post*; and *ex parte* Cockburn, *post*, Part III.

COIN.

F. 9 Vic., No. 1., ss. 2, 3. Bail disc.—(1) Counterfeiting gold or silver coin; gilding or silvering counterfeit coin to make it resemble current coin; gilding or silvering blanks with intent to make counterfeit coin of them; colouring or altering genuine coin with intent to make it pass for a higher coin, &c. (1)

(κ) The term "owner" shall mean the immediate proprietor or lessee; and the term "agent," any person having the care and direction of any mine on behalf of the owner. (S. 5). By s. 1, the Governor is empowered to appoint Examiners of Coal Mines.

(1) Any person finding in any place whatever, or in the possession of any person having the same without lawful excuse, any false coin or coining tools, may seize the same, and carry the same forthwith before some Justice; and a search warrant may be granted for counterfeit coin and coining tools; and the same shall be secured, as evidence against the offender. (S. 12). In England, the Mint Authorities pay, in all cases, the costs of the prosecution, if it be carried on under their

P. Tr. life—7 yrs.; or impr. not exc. 4 yrs., h. l., and s. c., (s. 16); or (*if male*) h. l. on roads 15—5 years; (*if female*), impr. 7—2 yrs., h. l. and s. c.

F. *Id.*, s. 4. *Bail disc.*—(2) Impairing current gold or silver coin.

P. Tr. 14—7 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr. 5—2 yrs. and h. l.

F. *Id.* s. 5. *Bail disc.*—(3) Buying, selling, &c., or importing counterfeit coin.

P. The same as offence (1).

M. *Id.*, s. 6. *Bail comp.*—(4) Uttering counterfeit gold or silver coin.

P. Impr. not exc. 1 yr., h. l. and s. c.

F. *Id.* *Bail disc.*—(5) Second offence is felony. (M)

P. Same as offence (1).

M. *Id.* *Bail comp.*—(6) Uttering same. accompanied by possession of other counterfeit coin, or uttering any other counterfeit coin, within ten days.

P. Impr. not exc. 2 yrs., h. l. and s. c.

F. *Id.* *Bail disc.*—(7) Second offence is felony.

P. Same as offence (1).

M. *Id.*, s. 7. *Bail comp.*—(8) Having possession of three or more pieces of counterfeit coin, with intent to utter the same.

P. Impr. not exc. 3 yrs., h. l. and s. c.

F. *Id.* *Bail disc.*—(9) Second offence is felony.

P. Same as offence (1).

F. *Id.*, s. 8. *Bail disc.*—(10) Any clerk, officer, or deputy, signing or certifying any copy of any such information, &c., as such clerk, or uttering any copy thereof with a false or counterfeit signature thereto, knowing the same to be false or counterfeit.

P. Tr. 14—7 yrs.; or impr. not exc. 2 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr. 5—2 yrs., h. l. and s. c.

F. *Id.*, s. 9. *Bail disc.*—(11) Making or mending, or having possession of, coining tools, without lawful authority, &c.

P. Same as offence (1).

F. *Id.*, s. 10. *Bail disc.*—(12) Counterfeiting copper coin, or making or mending, or selling, receiving, or having in possession without authority, any tools, &c., for such coin.

P. Tr. not exc. 7 yrs.; or impr. not exc. 2 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 5—3 yrs.; (*if female*), impr. 3—1 yr., h. l. and s. c.

M. *Id.* *Bail comp.*—(13) Uttering false copper coin, or having possession of three or more pieces thereof, with intent to utter.

direction. It would be advisable, therefore, to communicate with the Deputy Master of the Mint in Sydney, and lay before him the facts of the case, and receive his instructions.

(M) By s. 8, a copy of the previous information, indictment, and conviction, purporting to be signed and certified as a true copy by the Clerk of the Court, or other officer having the custody of the records of the Court, where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous information, &c., without proof of the signature or official character of the person appearing to have signed and certified the same.

P. Impr. not exc. 1 yr., h. l. and s. c. (N)

COMMITTAL.

See "ARREST," "APPREHENSION," "JUSTICES."

COMPOUNDING.

Compounding of felony is the taking reward for forbearing to prosecute an offence of that description; one kind of it (known as *theftbote*), is where party robbed takes his goods again, or other amends, upon agreement not to prosecute.

M. at Com. Law. Bail comp.—Compounding a felony.

P. Fine and impr. (1 Hawk, c. 59, s. 5).

M. at Com. Law. Bail comp.—Compounding a misdemeanor without legal sanction.

P. Same. (5 East, 298).

M. 18 Eliz., c. 5, s. 4; 56 G. III., c. 138, s. 14. Bail comp.—Compounding informations in penal statutes without leave of Court.

P. The same.

F. 7 & 8 G. IV., c. 29, s. 58. Bail disc.—Any person corruptly taking any money or reward, directly or indirectly, under pretence, or upon account of, helping any person to any chattel, money, valuable security, or other property whatsoever, which shall have been stolen, taken, obtained, or converted under the provisions of this Act.

P. Tr. life—7 yrs.; or impr. not exc. 4 yrs., and w.; or (*if male*) h. l. on roads 15—5 yrs.; (*if female*), impr. 7—2 yrs., h. l. and s. c.

CONCEALING BIRTH. (o).

M. 9 G. IV., c. 31, s. 14. Bail disc.—By woman, of child, by secret burying, or otherwise disposing of the dead body.

P. Impr. not exc. 2 yrs. and h. l.

CONFESSION.

See "EVIDENCE."

No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any untrue representation, or

(N) *Evidence, &c.*—S. 14 provides that the evidence of any witness, even though not an officer of the Mint, shall be sufficient proof of coin being counterfeit. By s. 15, accessories *before* the fact, in all felonies under this Act, shall be punished as principals; accessories *after* the fact shall be liable to imprisonment for not exceeding 2 years. S. 17 provides for offences under this Act committed within the jurisdiction of the Admiralty; and s. 18 contains the rules of interpretation as to current coin, counterfeit coin, and criminal possession.

(o) A person acquitted of child-murder may be found guilty of concealing the birth, if the evidence justifies such a finding. (9 G. IV., c. 31, s. 14). A temporary disposition of the body is sufficient, as placing it under the bolster of a bed, although with the intention of removing it elsewhere when an opportunity offered. (*R. v. Perry*, 24 L. J. M. C., 137).

by any threat or promise whatever ; and every confession made after any such representation, or threat, or promise, shall be deemed to have been induced thereby, unless the contrary be shown. (22 Vic., No. 7, s. 11).

In a case (*R. v. Spring & Mason*) at the last Goulburn Assizes, March, 1860, the effect of this section was much considered. The prisoners were indicted for the murder of one De Witt, who had disappeared under circumstances of suspicion ; the prisoners stated that he was drowned ; they were apprehended, and the dead body was found floating in a creek.

The constable, in giving his evidence, deposed that when the body was found, he went to the prisoners, who were confined in separate cells ; he swore that he first saw Spring by himself, and said, " We have found De Witt ; it appears that he was murdered, not drowned." The prisoner's counsel objected that what Spring said in reply was inadmissible, as being within the above section,—induced by an untrue misrepresentation.

Mr. Justice Wise :—" Although, before this statute, the statement would certainly have been admissible, the latter part of the section throws the *onus* of proving want of inducement on the Crown : the words of the section are, ' every confession made *after* such misrepresentation,' and not ' in consequence of.' As regards the meaning of the word ' untrue,' it may mean the statement of that which is known to be untrue, or the statement of that, as true, which is not known to be true ; both of these meanings are comprehended by the word untrue. Therefore, as the constable did not know that a murder had been committed, and the natural inference from his words was that he did know it, he stated that which he did not know to be true. The reply of Spring is inadmissible."

This decision is, it is believed, the first that has been given on this section.

CONSPIRACY.

Conspiracy is where two, or more than two, agree to do an illegal thing, that is, either (1), *to effect something in itself unlawful* ; or, (2), *to effect by unlawful means something in itself indifferent or even lawful*. " It has," remarks Tindal, C. J., (*O'Connell v. R.*, 11 Cl. & F., 233), " always been held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not." Hence, the agreeing of divers persons together to raise discontent and disaffection among the Queen's subjects is indictable. So, the agreeing and conspiring together to cheat or defraud the Government, (*R. v. Thompson*, 16 Q. B., 832), or a private individual, (*R. v. Kenrick*, 5 Q. B., 49), or obtain money by false pretences, or to obstruct, prevent, pervert, or defeat the course of public justice, (see 16 Vic., No. 17, s. 29), constitutes an indictable misdemeanor. So, by false reports, to raise fictitiously the price of shares in stock, that the Queen's subjects may be deceived and injured, and that, at their expense, a profit may be made by the conspirators, is a misdemeanor. (*Burnes v. Pennell*, 2 H. of L. Cases, 525). An indictment that S sold B a mare for £39 ; that while the price was unpaid, B and C conspired, by false and fraudulent representations made to S, that the mare was unsound, and that B had re-sold her for £27, to induce S to accept £27,

instead of the agreed-on price of £39, and thereby to defraud S of £12. Held that the indictment was good, and that, being supported by proof of the facts alleged, warranted conviction. (*R. v Carlisle*, 23 L. J. M. C., 110). "To render prisoners liable, the Act need not be successful."

Evidence].—A foundation should first be laid, by sufficient proof, establishing, *prima facie*, the fact of conspiracy between the parties, or, at least, tending to establish such fact; the connection of the conspirators being shown, every act and declaration of *each*, in pursuance of the common object, is, by law, the act and declaration of *all*, and is therefore evidence against each of them. A conspiracy is generally proved by circumstantial evidence, and the detached acts of the different parties accused, their written correspondence, entries made by them, and other documents in their possession relative to the main design, will sometimes, of necessity, be admitted as steps to establish the conspiracy. If there be no express proof of the conspiracy itself, such overt acts as tend to prove it should first be collected and proved, and then the remaining overt acts may be given in evidence. (*R. v. Murphy*, 8 C. & P., 297).

As to the distinction between declarations in pursuance of the conspiracy and mere narratives, see *R. v. Blake*, 6 Q.B., 126.

If two be charged with a conspiracy, and there be not sufficient evidence against one, the other must be discharged. For the same reason, a husband and wife cannot alone be indicted for a conspiracy, for these are but one person in law. But if two be indicted for having conspired with others who are not tried, then, if one be acquitted, the other may still be convicted. (1 Hawk, 72, s. 8).

M. at Com. Law. Bail comp.—By two or more persons: 1. To charge another with crime; 2. To injure others; 3. To commit illegal offences; 4. To pervert the course of justice; 5. To effect legal purposes by improper means.

P. Fine and impr., (with h. l., 16 Vic., No. 18, s. 28), or both.

CONTEMPT.

The question whether Justices in Petty Sessions have power to commit a party for contempt, for using insulting language, and such like offences, has arisen in several cases, (*Mayhew v. Locke*, 7 Taunt., 63); and, although the better opinion would appear to be that they have the power, it will be still more prudent for the Justices not to exercise it, but to expel the refractory party from their presence. If, however, they decide on committing, they must do so by warrant *in writing*, and for a *time certain*. (5 B. & Ald., 894).

CONSTABLE.

See "POLICE."

[See 21 Jas. I., c. 12, and 24 G. II., c. 44, Call., 714].

The following instructions have been promulgated in England for the guidance of constables, and are well worthy of the attentive consideration of all appointed to discharge similar duties in this Colony:—

The Constable may arrest one whom he has just cause to suspect to be about to commit a felony. Thus, when a drunken person, or a man in a violent passion, threatens the life of another, the constable should interfere and arrest.

He should arrest any person having in his possession any pick-lock-key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, outhouse, or stable; or any person armed with any gun, pistol, hanger, cutlass, bludgeon, or offensive weapon, or having upon him any instrument, with intent to commit any felonious act.

Every person found in any dwelling-house, warehouse, coach-house, outhouse, or stable, or in any enclosed yard, garden, or area, and being there for any unlawful purpose, may be arrested.

In each of these cases, the constable must judge from the situation and behaviour of the party, what his intention is. In some cases no doubt can exist; as when the party is a notorious thief, or acting with those who are thieves; or when the party is seen to try people's pockets in a crowd, or to attempt to break into a house, or to endeavour to take any property secretly from another. The constable will not act hastily, in case the intention is not clear, but content himself with watching closely the suspected party, that he may discover his design.

The constable must arrest anyone whom he sees in the act of committing a felony, or anyone whom another positively charges with having committed a felony, or whom another suspects of having committed a felony, if the suspicion appear to the constable to be well founded, and provided the person so suspecting go with the constable.

Though no charge be made, yet, if the constable suspect a person to have committed a felony, he should arrest him; and if he have reasonable grounds for his suspicion, he will be justified, even though it should afterwards appear that no felony was in fact committed; but the constable must be cautious in thus acting upon his own suspicions.

Generally, if the arrest was made discreetly and fairly in pursuit of an offender, and not from any private malice or ill-will, the constable need not doubt that the law will protect him.

If, after sunset, and before sun-rising, the constable shall see anyone carrying a bundle or goods which he suspects were stolen, he should stop and examine the person, and detain him; but here also he should judge from circumstances, (such as appearance and manner of the party, his account of himself, and the like), whether he has really got stolen goods, before he actually takes him into custody.

The constable must make every exertion to effect the arrest, and the law gives him abundant power for the purpose. If the felon or party accused of felony fly, he may be immediately followed wherever he goes; and if he take refuge in a house, the constable may break open the door, if necessary, to get in, first stating who he is, and his business; but the breaking open outer doors is so dangerous a proceeding, that the constable should never resort to it except in extreme cases, and when an immediate arrest is necessary.

There are some cases in which a constable may and ought to break into a house, although no felony has been committed, when the necessity of

the case will not admit of delay; as when persons are fighting furiously in a house, or when a house has been entered by others with a felonious intent, and a felony will probably be committed unless the constable interfere, and there are no other means of entering; except in such cases, it is better, in general, that the constable should wait till he has a warrant from a Magistrate for the purpose.

If a prisoner should escape, he may be re-taken, and, in immediate pursuit, the constable may follow him into any place or any house.

If a constable find his exertions insufficient to effect the arrest, he ought to require all persons present to assist him, and they are bound to do so.

In cases of actual breaches of the peace, as riots, affrays, assaults, and the like, committed within the view of the constable, he should immediately interfere, (first giving public notice of his office, if he be not already known), separate the combatants, and prevent others from joining in the fray. If the riot, &c., be of a serious nature, or if the offenders do not immediately desist, he should take them into custody, securing also the principal instigators of the tumult, and doing everything in his power to restore quiet.

A constable, in cases of assault which have not been committed in his presence, or within his view, is not authorized to arrest, or assist in arresting, the party charged, nor is he to receive a person so charged into his custody, unless the party has been arrested by some other constable who saw the assault committed.

He may arrest anyone assaulting or opposing him in the execution of his duty.

If a person forcibly enter the house of another, the constable may, at the request of the owner, turn him out directly; if he have entered peaceably, but having no right to enter, and the owner request the constable to turn him out, the constable should first request him to go out, and unless he do so, he should turn him out; in either case, using no more force than is necessary for the purpose.

When the offence has not yet been committed, but when a breach of the peace is likely to take place, as when persons are openly preparing to fight, the constable should take the parties concerned into custody; if they fly into a house, or are making preparations to fight within the house, the constable should enter the house to prevent them, and likewise take the parties into custody; and should the doors be closed, he may break them open, if admission be refused, after giving notice of his office, and his object in entering.

If a party threaten another with immediate personal violence, or offer to strike, the constable should interfere and prevent a breach of the peace; if one draw a weapon upon another, attempting to strike, the constable should take him into custody. If persons be merely quarrelling or insulting each other by words, the constable has no right to take them into custody, but should be ready to prevent a breach of the peace.

The constable ought to arrest, and take before a Justice, any person walking about the streets, and exposing to view in the street any obscene print or exhibition.

If a party charged with a misdemeanor escape out of custody, he may

be pursued immediately anywhere ; and if he take refuge in a house, the doors may be broken open after demand of admission, and after notification by the constable of his office and object in coming.

After arrest, the constable is in all cases to treat a prisoner properly, and impose only such constraint upon him as may be necessary for his safe custody.

The constable is bound to follow the directions contained in a warrant, and to execute it with secrecy and despatch ; the power given to him for the purpose of arresting has been already shown. If the warrant cannot be executed immediately, it should be executed as soon as possible afterwards.

The constable must execute the warrant himself, or, when he calls in assistance, must be actually present. Upon all occasions he ought to state his authority, if it be not generally known, and should show his warrant when required to do so ; but he should never part with the possession of the warrant, as it may be wanted afterwards for his own justification.

Upon the arrest being made, the prisoner is to be taken before the Magistrate as soon as convenient. When the prisoner is brought to the Justice, he still remains in custody of the constable until his discharge or committal, or until the officer receives the orders of the Justice.

The constable may enter a house to search for stolen goods, having first got a search-warrant from a Magistrate for that purpose. He should, when it is possible to do so, execute it in the day-time. If he find the goods mentioned, he is to take them to a Magistrate, and, when the warrant so directs, he must take the person also in whose possession they are found. To avoid mistakes, the person who applies for the warrant ought to attend at the search to identify the goods.

The constable has power to apprehend and carry before a Justice of the Peace every common prostitute wandering in the public streets, public highways, or in any place of public resort, behaving in a riotous or indecent manner ; every person wandering abroad, or placing himself or herself in any public street or highway, court, or passage, to beg or gather alms, or causing or procuring, or encouraging, any child so to do, all such being declared by the law to be idle and disorderly persons ; every person wandering abroad, or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself ; every person wandering abroad, and endeavouring, by the exposure of wounds or deformities, to obtain or gather alms ; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence ; every person playing or betting in any street, road, highway, or other open or public place, at or with any table or instrument of gaming, at any game or pretended game of chance. In the cases above mentioned, the constable has, by law, power to arrest.

Protection of Constables.—By s. 23 of 16 Vic., No. 33, it is provided that, when any action shall be brought against any Chief or other constable for any act done in obedience to the warrant of a Magistrate, such Chief or other constable shall not be responsible for any irregularity in the

issuing of such warrant, or for any want of jurisdiction in the Magistrate issuing the same; and such Chief or other constable may plead the general issue, and give such warrant in evidence; and upon producing such warrant, and proving that the signature thereto is the handwriting of the person whose name shall appear subscribed thereto, and that such person is reputed to be and acts as a Magistrate, possessing jurisdiction in the case, and that the act or acts complained of were done in obedience to such warrant, the jury shall find a verdict for such constable, and he shall recover his costs of suit.

16 Vic., No. 33, s. 8, gives the following Oath to be taken by the members of the Police Force:—

"I, A. B., do swear that I will well and truly serve our Sovereign Lady the Queen in the office of Inspector-General of the Police Department, [Superintendent of Police for the Metropolitan District, Superintendent of Mounted Patrol for Roads and Gold Escorts, Chief or other constable, (*as the case may be*)], without favour or affection, malice or ill-will; that I will see and cause Her Majesty's peace to be kept and preserved; and that I will prevent, to the best of my power, all offences against the same; and that, while I shall continue to hold the said office, I will, to the best of my skill and knowledge, discharge all the duties thereof, in the execution of warrants and otherwise, faithfully according to law; and that I do not now belong to, and that I will not, while I hold the said office, join, subscribe, or belong to, any political society whatsoever, or to any secret society whatsoever, unless to the society of Freemasons.—So help me God."

The said oath shall be administered either at General or Petty Sessions, or otherwise by any Justice of the Peace, and shall in all cases be subscribed by the person taking the same; and the oath so taken by the Inspector-General shall be forthwith transmitted to the Colonial Secretary by the Justice or Justices before whom the same was taken; and the oaths so taken and subscribed by all other persons appointed under this Act, shall be forwarded by the Justice or Justices before whom the same were taken, to the Inspector-General.

S. 16 Vic., No. 33, s. 9. [*Two Justices*].—(1) Any Chief or other Constable holding office under this Act, neglecting or refusing to obey and execute any warrant directed to be by him executed, or guilty of any neglect or violation of duty in his office.

P. Fine not exc. £5: to be deducted from any accruing salary under this Act, upon a certificate thereof, to be by the convicting Justices transmitted to the Colonial Treasurer; and, at their discretion, dismissal. (P)

N.B.—*Such Chief or other Constable may appeal to the Governor.*

S. *Id.*, s. 10. [*Two Justices*].—(2) Any Chief or other Constable not

(P) *Appropriation of Penalties, Evidence*.—All fines under this Act to be applied to the Police Reward Fund, (s. 22); and, by s. 16, common reputation shall be deemed to be sufficient *prima facie* evidence of the right of the Inspector-General, or other member of the Force, to hold or execute his office, or as to his holding such office; and it shall not be necessary to have or produce any written appointment, or any oath, affidavit, or other document or matter whatsoever, in proof of such right.

delivering over, within one week after he shall have been dismissed from, or shall have ceased to hold, his office, all and every the arms, ammunition, and accoutrements, horse, saddle, bridle, clothing, and other appointments whatsoever, which may have been supplied to him for the execution of such office, to such person as may be appointed by the Inspector-General in the Metropolitan district, or by the several Benches of Magistrates in all other districts, to receive them.

P. Impr. and h. l. for not exc. 3 mths., and seizure of said articles.

S. *Id.*, s. 11. [*Two Justices*].—(3) Any Chief or other Constable resigning, withdrawing, or absenting himself, without previous permission, in writing, so to do by the Inspector-General or Benches of Magistrates, respectively, under whom he may be placed; or before the expiration of three months' notice of his intention so to resign or withdraw.

P. Fine not exc. £10; or, on failure of payment, impr. and h. l. for not exc. 3 mths., (s. 23 of 11 & 12 Vic., c. 43); and offender is liable to serve out his time, and to forfeiture of any allowance, remuneration, or superannuation to which he might otherwise be entitled. (See s. 21 of 16 Vic., No. 33).

N.B.—*This section does not apply to any constable procured under the Police Recruiting Act, 17 Vic., No. 30, s. 6.*

S. 16 Vic., No. 33, s. 12. [*One Justice*].—(4) Any toll-collector demanding or receiving any duty or toll contrary to this Act. (q)

P. Fine not exc. £10: to be recovered by distress, (s. 12 of 16 Vic., No. 33); and, in default of distress, impr. not exc. 3 cal. m. (S. 22 of 11 & 12 Vic., c. 43).

S. *Id.*, s. 14. [*One Justice*].—(5) Any person duly summoned on inquiries instituted under this Act, (r) and respecting any charge against any member of the Police Force, not attending at the time and place named in the summons, or attending and refusing to be sworn, or, being sworn, refusing to give evidence, or to answer all such questions as may be legally demanded of him.

P. Fine not exc. £5; in default of payment, impr. not exc. 1 mth. (See s. 23 of 11 & 12 Vic., c. 43).

S. *Id.*, s. 15. [*Two Justices*].—(6) Any person, not being a member of the Police Force under this Act, having in his or her possession any

(q) By s. 12, The Inspector-General, &c., and all Chief and other constables, being on actual duty, and in proper dress or undress as such, and all prisoners under their charge, and all carriages and horses exclusively employed in carrying or conveying such persons, or their prisoners or baggage, or returning therefrom, and not otherwise engaged or employed, shall be exempt from payment of any tolls or dues otherwise demandable in passing any toll-gate, turnpike road, bridge, or ferry.

(r) By s. 14, The Inspector-General, &c., or any Justice, may examine on oath into the truth of any charge, on complaint preferred against any member of the Police Force holding office under this Act, (see *supra*, offence 3), of any neglect or violation of duty in his office, and also into the matter of any appeal under the proviso of s. 8; and, by s. 15, such Inspector, &c., or Justice, may issue a summons, requiring all such persons named therein to appear before him, at a place and time to be therein appointed, to give evidence as to all matters or things known to such persons respecting any such charge or complaint preferred against any such member of the Police Force.

arms or ammunition, or any article of clothing, accoutrements, or appointments, supplied to any member of the Force, and not being able satisfactorily to account for his or her possession thereof,—or putting on or assuming the dress, name, designation, or description of any member of the Force, or of any class of such members, for the purpose of thereby obtaining admission into any house or other place, or of doing or procuring to be done any other act which such person or persons so putting on or assuming such dress, name, designation, or description, would not by law be entitled to do or procure to be done by his or their own authority.

P. Fine not exc. £10 : to be recovered by distress, or, in default of payment thereof, impr. with h. l. for not exc. 3 mths. (11 & 12 Vic., c. 43, ss. 19, 22).

S. 6 W. IV., No. 4, s. 12. [*One Justice*].—(7) Any constable failing or neglecting to report to the Police Magistrate, or Justice of the town, any dog which shall be kept in his division, &c., without being duly registered.

P. Fine 20s.—10s. for each dog : to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to 5 W. IV., No. 22. (See "*Justices, Recovery of Fines*," where s. 1 of 5 W. IV., No. 22, is given at length).

S. *Id.*, s. 13. [*One Justice*].—(8) Any constable neglecting to destroy, or to use his best endeavours to destroy, every dog which he shall find at large, contrary to the provisions of this Act, within his division, &c.

P. Fine 20s.—10s. : to be recovered as offence (7).

S. *Id.*, s. 14. [*One Justice*].—(9) Any constable or other person wilfully or maliciously killing or destroying any dog which shall not be at large contrary to the provisions of this Act.

P. Fine £5—£1, and full value of the dog : to be recovered as offence (7). See "*Dog*," *post*.

M. at Com. Law. Bail disc.—(1) Refusing to execute the office when required by law to do so, [*e. g.*, as chief or petty constable, &c.], or neglecting duty.

P. Fine or impr., or both. (*R. v. Bowen*, 1 B. & C., 585 ; *Ar. Cr. Pl.*, 751).

M. at Com. Law. Bail comp.—(2) Any person refusing to assist a constable when called upon.

P. The same. (1 *Car. & M.*, 314 ; *Wise on Riots*, 55).

CONVICT.

See "*FELON*."

CORONER.

The office of Coroner is very ancient. He is called Coroner, (*Coronator*), says Blackstone, because he has principally to do with pleas of the Crown. The office is both ministerial and judicial, but chiefly judicial, (*Garnett v. Ferrand*, 6 B. & C., 625, *sed quare* by Lord Abinger; *Jewison v. Dyson*, 9 M. & W., 585) ; it consists, chiefly, in inquiring, when any person is slain, or dies suddenly or in prison, concerning the manner of his death.

It is a Court of Record; there must be twelve jurymen, and they must concur in their verdict; but by s. 34 of 11 Vic., No. 20, (the Jury Act), it is provided that, in thinly-populated districts, it shall be lawful for the Coroner, at his discretion, to swear a jury of any number, not less than five, and the verdict of such jury shall be as valid and effectual in law as if the accustomed number were impannelled and sworn.

By s. 40, Any man, being duly summoned and returned to serve as a juror upon any inquest before any Coroner, and, after being openly called three times, not appearing and serving as a juror, shall be fined not exc. £5, (to be imposed by the Coroner), unless some reasonable excuse, *on oath*, be proved: the Coroner is to make out a certificate, and sign it, containing Christian and surname of defaulter, residence, and calling.

The inquest must sit *super visum corporis*, for if the body cannot be found, the Coroner cannot sit, except by virtue of a Special Commission. In this colony the Governor's commission empowers him to appoint Coroners. S. 4 of 7 G. IV., c. 64, requires every Coroner upon any inquisition, under penalty,—to take the evidence in writing,—to bind witnesses, by recognizance, to appear at the trial,—and to certify and subscribe the same, and the inquisition.

1 Vic., No. 3, provides for the attendance and remuneration of duly qualified medical witnesses.

The late Act of 19 Vic., No. 17, provides that foreign medical practitioners, properly qualified, shall be deemed legally qualified practitioners, so as to be qualified as medical witnesses on Coroners' inquests and other inquiries, modifying 9 Vic., No. 12, and 2 Vic., No. 22.

It is the duty of the Coroner to read over to every witness examined on the inquest the evidence he has given, and desire the witness to sign it. *R. v. Plummer*, 1 C. & K., 600). It is the duty of the Coroner to bind over all those witnesses who prove any material facts against the accused, and not those called for the purpose of exculpating him. (*R. v. Taylor*, 9 C. & P., 672).

By 29 s. of 16 Vic., No. 18, verdicts of murder and of manslaughter, returned by a jury at a Coroner's inquest, and the warrant of committal, or recognizance of bail thereupon issued or taken, are to be deemed equivalent to ordinary committals, or holding to bail by Magistrates.

1. A Coroner's inquest should be held in all cases of violent death, casualties by which death ensues, sudden deaths, persons found dead, persons dying in prison, lunatics who die by suicide, and persons committing suicide, for the purpose of inquiring into and ascertaining the manner of the death. If a constable, or anyone in authority, knowingly suffer any person to be buried who died in the manner mentioned in any of the above cases, he will be liable to a criminal prosecution, and the body of the person buried must be taken up again for inquiry.

2. In all cases of violent and unnatural deaths in houses or other buildings, the Coroner shall be sent for, if possible, whilst the body remains in the same position as when the party died.

3. The duty of the constable or other peace officer, when any of the above cases occur in his own knowledge, or when he has received information of and ascertained the fact, is to apply immediately to the Coroner for a precept or warrant to summon a jury.

4. A constable not executing or making a return to this warrant, is liable to be fined.

5. If a body has been interred on which an inquest ought to have been held, on application to the Coroner, he will grant his warrant for the disinterment.

6. The name of the deceased should be correctly ascertained, if it be possible, and the nature of the death, whether by accident, suicide, or otherwise, and stated to the Coroner for his information, in issuing his warrant.

7. The officer should take charge of, and produce on the inquest, any papers or other property that may be found on searching the body of anyone unknown that may be found dead in the street, highway, or other by-place; and he should act in the same manner when the party is known.

8. He should also produce or cause to be exhibited to the Court, any weapon or instrument that may be found, supposed to have been the means of death.

9. When death is caused by any waggon, cart, or carriage, it should be identified by its number, or by the name and residence of the owner and driver, if they can be ascertained.

The constable should summon a jury and the necessary witnesses. The latter should be served personally, if possible; they should be kept out of court until called in separately to give evidence. The constable should remain in court, and prevent interruption, and obey all the lawful orders of the Coroner.

The names of the jurymen having been called, and a foreman appointed, those persons who have answered must stand up to be sworn as jurors.

The officer has charge of the jury, and should see that all of them accompany him to view the body. Should they retire, he must keep charge of them, but should not interfere with them, or allow anyone else to do so. A warrant will be given to the officer by the Coroner for the burial of the body, who can hand it over to the relatives of the deceased.

It may be inferred from the case of *Garnett v. Ferrand*, 6 B. & Cress., 611; 9 D. & R., 657, that the Coroner has the power of excluding particular individuals, attorneys, counsel, &c., and the public generally.

No person ought to be allowed to make a statement before a Coroner, not on oath. Whenever a person comes forward and offers to make a statement, he ought first to be sworn, no matter whether other evidence may point suspicion to him or not. It is the duty of the Coroner to receive evidence on oath alone, and he should not allow the party to make a simple statement not on oath, on the ground that his evidence may possibly criminate him hereafter. All that the Coroner can do is to caution a party who is giving evidence on oath, if he should think his evidence tends to criminate him, and to leave it to his discretion to go on or not as he pleases.

CRIMINAL INFORMATION.

See "JUSTICES."

When a Justice of the Peace is guilty of any gross act of oppression committed by him in the exercise or alleged exercise of his magisterial

duties, or actuated by any vindictive or corrupt motive, he is liable to be punished by a Criminal Information. Misconduct in his office may render him liable, though he be not actuated by motives of pecuniary interest or personal malice; as if he gave way to passion, so as clearly to interfere with the due administration of justice; but a mere display of ill-humour, or an error of judgment, such as the omission to administer an oath, or to give a caution to a dying man before taking his examination, would not induce the Court to interfere. (*R. v. Barker*, 4 Cox C. C., 353).

CRUELTY.

See "ANIMALS," "SERVANTS."

M. at Com. Law. Bail comp.—Cruelty to those of tender years under one's control,—as by not providing food, &c.,—or deserting infant in street, &c., whereby injury to health occasioned.

P. Fine or impr., or both. (2 Camp., 650; 22 L. J. M. C., 113; 24 L. J. M. C., 109; and see 16 Vic., No 17, s. 7).

CUSTOMS AND EXCISE.

See 9 Vic., No. 15; 10 Vic., No. 9; 13 Vic., No. 43; and 20 Vic., No. 22.

DEAD BODIES.

M. At Com. Law. Bail Comp.—Disinterring a dead body.

P. Fine or impr., or both. (s)

DISOBEDIENCE.

M. At Com Law. Bail comp.—Disobedience of a Justice's order; or of the direction or prohibition of a statute, where no penalty is annexed.

P. Fine or impr., or both. (Dick. Q. S., 288, 454; *R. v. Buchanan*, 8 Q. B., 887).

DISORDERLY HOUSE.

See "THEATRE."

Every *bawdy-house* is necessarily a disorderly house, but every disorderly house is not necessarily a brothel; and though the proof of one may fail, the evidence may be sufficient to maintain a charge of the other.

A *wife* may be indicted with her husband, and punished with him, for keeping a bawdy-house. In all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any *feme sole*. (4 Steph. Com., 105).

Evidence].—It must be proved that the house in question, or a room

(s) *R. v. Lynn*, 2 T. R., 733; *R. v. Gillies*, R. & Ry., 366 n., and a recent case, *R. v. Sharpe*, 26 L. J. M. C., 47, where it is held to be a misdemeanor at Common Law, to enter an unconsecrated burial ground, and, without the knowledge and consent of the owners thereof, to dig up and carry away a corpse buried therein, although the party may have been actuated by religious feeling, and have conducted the matter most decently.

or rooms in it, were let out for the purposes alleged. If a lodger let her apartment for the purpose of indiscriminate prostitution, it is as much a bawdy-house as if she held the whole house. (2 Ld. Raymond, 1197). It is not necessary to prove *who* frequents the house, for that may be impossible; and if any unknown persons are proved to be there, behaving disorderly, it is sufficient to support the indictment. (1 T. R., 754).

Evidence of *particular instances* may be given under the general charge. It must be proved that the defendant *acted* or behaved as master or mistress, or as the persons having the care and government, or "management of the house in question," which is sufficient evidence that they kept the house.

By 14 Vic., No. 23, s. 3, Every house, room, building, garden, or place, wherein any such entertainment of the stage (see s. 2) shall be acted, &c., unless the same shall be authorized by the Colonial Secretary, shall be deemed a disorderly house, room, building, or place. And see "Theatre."

S. 13 Vic., No. 29, s. 37. [*Two Justices*].—Any person having or keeping any house, shop, room, or place of public resort, wherein provisions, liquors, or refreshments of any kind shall be sold or consumed, and wilfully or knowingly permitting drunkenness or other disorderly conduct in such house, &c., or knowingly suffering any unlawful games or gaming whatsoever therein,—or knowingly permitting or suffering prostitutes, or persons of notoriously bad character, to meet together and remain therein.

P. Fine not exc. £10. See "Publican," and the case of *Greig v. Bendeno*, 27 L. J. M. C., 294.

M. at Com. Law. Bail comp.—Keeping indecent brothels, gaming-houses, and disorderly places of resort.

P. Fine or impr., or both. (Dick. Q. S., 423).

DISTILLER. (T)

See "BREWER."

The regulations provided by the Legislature for the Distillation, Rectifying, and Compounding of Spirits, for the warehousing under bond, and

(T) *Procedure*].—This work does not profess to enumerate all the offences under the Distillery Statutes, but only such as are likely, in ordinary practice, to come under the recognizance of Justices.

With regard to the procedure under these statutes, it is to be remembered that by s. 35 of Jervis's Act, the provisions of the latter statute are not to extend to "complaints and orders with respect to lunatics, &c., nor to any information or complaint, or other proceeding, under or by virtue of any of the statutes relating to H. M.'s revenue or Excise, Stamps, Taxes, Post Office, &c." There is some difficulty in deciding how far this section is applicable to this Colony. The following Notes from the last edition of Paley point to a distinction between those proceedings for penalties which are conducted by the officers of particular departments,—*e. g.*, prosecutions under the Distillery Acts, (13 Vic., Nos. 26 & 27), and under the Postal Act, (13 Vic., No. 38); see, *post*, "Post Office,"—and other proceedings, where the information can be laid by any person whatever. If this is the true distinction, the Licensed Publicans' Act would be within the operation of Jervis's Act:—

the exportation, free of duty, of Colonial Spirits, are very numerous and elaborate; for which reference must be made to the statute. (13 Vic., No. 27).

S. 13 Vic., No. 27, s. 2. [Two Justices].—(1) Any person carrying on the business of a distiller, or a rectifier and compounder of spirits, or having, keeping, or making use of any still or other utensil for distilling, or for rectifying and compounding spirits, except in such places as the Governor shall appoint or direct by proclamation, to be published in the *Gazette*.

P. Fine £500—£100; (v) if not immediately paid, or satisfactory security given, impr. 12—3 mths., unless sooner paid. (S. 127).

“With reference to these exceptions under s. 35 of Jervis's Act, Mr. Archbold (Jervis's Act, p. 187, &c., 2nd. ed.) remarks that orders of removal and lunatic orders are not within the scope of the Act, because they are made *ex parte*, and their truth or validity cannot be tried out of sessions. Convictions for offences relating to the Excise, Customs, Stamps, Taxes, and Post-office are excluded, because the officers in these departments were accustomed to, and had a confidence in, their respective modes of proceeding, which they were unwilling to exchange for any other. As to convictions under the Factory Acts, the whole law in this respect is now usually administered by the Factory Inspectors, who have a concurrent jurisdiction, in such matters, with the Justices of the Peace; and these Factory Inspectors were so used to their own mode of proceeding, and (as they conceived) had got it into such admirable working order, that they begged that their proceedings might be excluded from the operation of this Act, and it was conceded to them. It is to be remarked that the statutes relating to the matter thus excepted, provide Forms, which, for the most part, are as general as those given by the Act in question.”—Paley, *S. Convictions*, p. 50. And again, in the same book, is found the following Note:—“This statute (*sc.*, relating to Alehouse-keepers, 9 G. IV., c. 61), is not exempt from the operation of 11 & 12 Vic., c. 43, as being a statute relating to the excise, (s. 35), although the statutes regulating the sale of beer and cider in *beer-houses* and *shops*, (1 W. IV., c. 64, 4 & 5 W. IV., c. 85, and 3 & 4 Vic., c. 61), come under this denomination. The distinction is this: The last mentioned statutes apply to such persons who take out an *excise* license for the sale of beer and cider only by retail; or, in other words, they extend to *retail beer-houses*, as distinguished from *inns* or *public-houses*. The keeper of a retail beer-house does not require a Magistrate's license under 9 G. IV., c. 61, but is authorized to sell beer and cider, (which include ale, porter, and perry), by retail, on taking out an excise license. But, by st. 9 G. IV., c. 61, the *keeper* of a *common inn*, *ale-house*, or *victualling house* requires a Magistrate's license, and may also, under the provisions of that statute, procure a license to sell beer and cider, as well as wine and spirits, by retail, without taking out a license for that purpose under the Excise Acts above referred to. (See 1 B. J., pp. 60, 82).”—Paley on *Convictions*, 512). The recent case of *R. v. Bakewell*, 26 L. J. M. C., (150), in which the effect of s. 35 is very fully considered, decides that the exception in this section does not apply where the particular information or complaint proceeds upon a section of a statute not relating to the revenue of excise, &c., although there are other sections in the statute which do relate to the revenue of excise. Lord Campbell, C. J.:—“The effect of this statute is, that with respect to all matters affecting the revenue, the officers of the revenue should be at liberty to follow their own course and mode of conducting proceedings as before the Act. In matters which have nothing to do with the revenue of excise or customs, Jervis's statute has given a useful general form, and that form has been followed here. The conviction will be affirmed.”

(v) *Informations, &c.*—Penalties must be sued for within one year after the commission of the offence; one-third of which is to be appropriated to Government, one-third to the informer, and one-third to the prosecutor, where such fines,

S. Id., s. 3. [Two Justices].—(2) Any person having, keeping, or making use of any still, or other utensil for distilling, or for rectifying and compounding spirits, in the colony, &c., without first having obtained a license for keeping or using the same from the Colonial Treasurer or other person appointed by the Governor.

P. Fine £500—£100, with forfeiture of such still and utensils: fine recoverable as offence (1).

S. Id., s. 17. [Two Justices].—(3) Any apothecary, chemist, or druggist, having in his possession any still, without having entered into the recognizance required by s. 17, and obtained a license from the Colonial Treasurer.

P. Fine £500—£100: recoverable as offence (1).

S. Id., s. 18. [Two Justices].—(4) Any person keeping or using any still of not more than eight gallons content for any scientific purpose, or for the purpose of distilling scent or perfume from any vegetable matter, &c., without having entered into the proper recognizance, (see 18 s.), and obtained a license from the Colonial Treasurer.

P. Fine £500—£100: recoverable as offence (1).

S. Id., s. 19. [Two Justices].—(5) Any maker of wine from grapes, the produce of his own vineyard, having in his possession any still without having entered into the proper recognizance, (see 19 s.), and obtained a license from the Colonial Treasurer.

P. Fine £500—£100: recoverable as offence (1).

S. Id., s. 24. [Two Justices].—(6) Any Gas Light Company, or manufacturers of gas, having in their possession any still, without having entered into the proper recognizance, and obtained a proper license.

P. Fine £500—£100: recoverable as offence (1).

S. Id., s. 26. [Two Justices].—(7) Any person who shall have obtained licenses under the provisions of this Act, or any person whatsoever, practising, following, or using the trade or business of a brewer of ale, porter, beer, or ginger beer, within the premises on which there is a still, or on any part thereof, or on any place or premises within one hundred yards of the premises on which there is a still.

&c., are recovered in consequence of information being given to the seizing officer; otherwise, one-half to Government, and one-half to the seizing officer, or person suing. (S. 126).

The Forms of Information, Conviction, and Warrant of Commitment are given in the Act, and, as, perhaps, revenue cases are excluded from the operation of *Jervis's Act*, should be strictly followed. (See s. 35 of 11 & 12 Vic., c. 43). By s. 122, Every conviction or warrant of commitment for any penalty shall be deemed valid, &c., in which the offence, &c., is set forth in the words of the Act, or words to the like effect. By s. 119, All informations, suits, or actions for the recovery of any fine, forfeiture, or penalty imposed by this Act, may be heard and determined in a summary way before any two or more Justices of the Peace, or the Judges of the Supreme Court, at the instance of any Inspector of Distilleries; and any such information, &c., shall and may be filed in the name of the Attorney-General, or of the Chief or other Inspector of Distilleries; and *viva voce* evidence shall be deemed sufficient evidence of his being such Chief or other Inspector. By s. 123, In case of any information, &c., the averment that the prosecutor is an Inspector, &c., shall be sufficient proof of such appointment, unless the defendant prove the contrary. By s. 125, In any seizure or stoppage for non-payment of duties, the proof that the duties have been paid shall lie on the owner or claimant. 13 Vic., No. 27, is slightly modified by 14 Vic., No. 22.

P. Fine £100: recoverable as offence (1).

MEM.—SS. 28—88 contain numerous regulations to be observed by distillers under specified penalties. (See the Act).

S. 13 Vic., No. 27, s. 89. [*Two Justices*].—(8) Any person selling or disposing of, or offering to sell or dispose of, any quantity of illicit spirits, or spirits part of which is illicit.

P. Fine £100: recoverable as offence (1).

S. *Id.*, s. 89. [*Two Justices*].—(9) Any person knowingly purchasing any such spirits.

P. Fine £100: recoverable as offence (1); together with forfeiture of the said spirits so purchased.

MEM.—SS. 99—105 contain the provisions binding rectifiers under penalties.

S. *Id.*, s. 108. [*Two Justices*].—(10) Any person giving, offering, or promising to give, any bribe, recompense, or reward, or making any collusive agreement with any Inspector or other officer appointed by the Governor under this Act, to induce him to neglect his duty, or to conceal or connive at any act whereby any provisions of any existing Act relating to the distillation of spirits may be evaded.

P. Fine £200, whether such gift be accepted, or such promise performed, or not: recoverable as offence (1).

S. *Id.*, s. 108. [*Two Justices*].—(11) Any Inspector or other officer, directly or indirectly, taking or receiving any bribe, recompense, or reward, or in any way neglecting his duty, or concealing or conniving at any act whereby the provisions of any existing Act relating to the distillation of spirits may be evaded.

P. Fine £200: recoverable as offence (1).

S. 13 Vic., No. 26, s. 9. [*Two Justices*].—(12) Any person having in his possession or custody any unlicensed still, or any still-head, or worm, or other utensil for distilling whatsoever,—or unlawfully making,—or aiding, assisting, or being otherwise concerned in unlawfully making any spirits,—or knowingly supplying the means or materials for establishing, working, or maintaining any unlicensed still,—or knowingly carrying, conveying, or concealing,—or aiding, assisting, or being otherwise concerned in the carrying, conveying, or concealing any spirits upon which the full duty shall not have been paid.

P. Fine £500—£100; if not immediately paid or satisfactory security given, impr. 12—3 mths., unless sooner paid. (S. 41). (v)

N.B.—*In informations and convictions under the first part of this section, "having in his possession, &c., any still, &c.," it is well to aver, that it is*

(v) *Recovery of Penalties, &c.*—Penalties under this Act are to be sued for in the name of some officer of Customs, or Inspector of Distilleries, by information in a summary way before two Justices; they may be commenced and prosecuted at any time within one year after the commission of offence. If any fine is not immediately paid, or security given to the satisfaction of the Justices for due payment of such fine, the offender shall forthwith be committed to gaol for not exc. 12 and not less than 3 mths., unless the fine be sooner paid. (S. 41). It is to be considered whether the class of cases are not within the exclusion clause, (s. 35 of 11 & 12 Vic., c. 43). See Note (v) *supra*. By s. 36, The statement of the offence in any conviction, &c., in the words of the Act, or words to the like effect, shall be sufficient, &c.

for distilling spirits. (See *Re Williams*, in the Supreme Court, August 28th, 1858, *post*, Part III.)

S. 13 *Vic.*, No. 26, s. 10. (w) [*Two Justices*].—(13) Any person commencing to make, or landing out of any ship, any still, still-head, worm, or other utensil for distilling whatsoever, without having first given notice thereof in writing, setting forth the number of gallons which such still is capable of containing, to the Chief Inspector of Distilleries, or other appointed person.

P. Fine not exc. £50: recoverable as offence (12).

S. *Id.*, s. 11. [*Two Justices*].—(14) Any person selling any such still, still-head, worm, or other utensil for distilling whatsoever, either separately or as part of any house, &c., in which any still shall have been erected, without having first given notice in writing to the Chief Inspector, of the name and residence of the purchaser thereof, and also of the contents, or knowingly giving an incorrect return.

P. Fine not exc. £50: recoverable as offence (12). (Note v).

S. *Id.*, s. 12. [*Two Justices*].—(15) Any person erecting or setting up any still, without having first given notice, in writing, to the Chief Inspector of his intention so to do, (setting forth the number of gallons such still is capable of containing, the name and residence of the owner thereof, the place in which it is intended to be erected and set up, and the purpose for which it is to be used),—or knowingly giving an incorrect return.

P. Fine £500—£100: recoverable as offence (12); unless such person shall at the time hold a valid license under any Act in force for the time being relating to distillation.

S. *Id.*, s. 15. [*Two Justices*].—(16) Clerk of the Bench failing or neglecting to make return of registrations under s. 15, within ten days after every such registration, which return shall be an exact copy thereof.

P. Fine not exc. £5: recoverable as offence (12).

S. *Id.*, s. 17. [*Two Justices*].—(17) Any person carrying on the trade or business of a brewer, or selling or being engaged in the trade or business of selling spirits upon which the duty has been paid, and in quantities of two gallons or upwards, without having registered or renewed the registration of his name and premises.

(w) By s. 3, Upon information by Inspector of Distilleries, Officer of Customs, or person appointed by the Governor, under s. 1, before any Justice, setting forth his grounds of suspicion, such Justice may, by warrant, authorize such person, by day or night, (if at night, in the presence of a constable), to break open doors of house, &c., where any unlicensed still, or any still-head, &c., are suspected to be set up, &c., and to enter, and to seize everything found therein, and either detain the same in the house, &c., or remove them to the Excise warehouse, or nearest Police Office, or other place of security; and s. 4 authorizes such entry, &c., with writ of assistance.

By s. 6, Inspector of Distilleries, Officer of Customs, or other person appointed by the Governor, may arrest offenders, and (s. 7) they may be detained a reasonable time, or, if they escape, be again arrested.

Brewers are to have their names registered by the Clerk of the Bench of the nearest Court of Petty Sessions; such registration is to contain a particular description of the premises, &c., and is to be renewed every 1st of January, (see Sch. A of the Act), s. 13; and s. 14 makes the same provision for Spirit Merchants; and within ten days after such registration, an exact copy thereof is to be returned by the Clerk of the Bench to the Inspector-General.

P. Fine not exc. £30, or, at the prosecutor's option, not exc. £5 for every day's failure to register : recoverable as offence (12). (Note v)

S. *Id.*, s. 19. [*Two Justices*].—(18) Any person engaged in the business of a brewer, carrying on the trade, &c., of a dealer in spirits, either by wholesale or retail, upon any premises registered for carrying on the trade, &c., of brewing, or on any premises situate within 100 yards of the same.

P. Fine not exc. £30 : recoverable as offence (12).

S. *Id.*, s. 20. [*Two Justices*].—(19) Brewer keeping beyond six imperial gallons of spirits on any registered premises.

P. Fine not exc. £2 for every gallon seized, and forfeiture thereof : recoverable as offence (12).

S. *Id.*, s. 21. [*Two Justices*].—(20) Registered brewer neglecting to have his name painted legibly, in letters not less than two inches in length, upon every dray, cart, or other vehicle, used for the purpose of his trade or business.

P. Fine not exc. £20 : recoverable as offence (12). (Note v).

S. *Id.*, ss. 18, 22. [*Two Justices*].—(21) Any person obstructing or offering any hinderance to any Officer, Inspector, Officer of Customs, or person appointed by the Governor under s. 1, in the performance of their duty.

P. Fine not exc. £50 : recoverable as offence (12). (Note v).

S. 13 *Vic.*, No. 26, s. 24. [*Two Justices*].—(22) Any person giving, offering, or promising to give, any bribe, recompense, or reward,—or making or offering to make any collusive agreement with any Inspector of Distilleries, Officer of Customs, or other person appointed by the Governor, (s. 1), to induce him in any way to neglect his duty, or to conceal or connive at any act whereby any of the provisions of this or any other Act, now or hereafter in force, relating to distillation, may be evaded ; whether such gift or offer shall be accepted, or such promise performed, or not.

P. Fine not exc. £200 : recoverable as offence (12).

S. *Id.*, s. 24. [*Two Justices*].—(23) Any Inspector of Distilleries, Officer of Customs, or other person appointed by the Governor, (s. 1), directly or indirectly taking or receiving any bribe, recompense, or reward, or in any way neglecting his duty, or concealing or conniving at any act whereby any of the provisions of this or any other such Act may be evaded.

P. Fine not exc. £200 : recoverable as offence (12). (x)

DISTRESS.

15 *Vic.*, No. 11, s. 22. (y) [*Two Justices*].—Any person knowingly and wilfully distraining for rent, as the agent or bailiff of another, without

(x) *Claims, Evidence*].—SS. 30—32 regulate claims as to goods seized, &c. S. 37 provides as to the proof of appointment of officers, &c. S. 39, as to the proof of payment of duties. These sections are similar to those of 13 *Vic.*, No. 27). (See, *supra*, Note (v).

(y) By s. 1, No landlord is to distrain except personally, or by his agent or bailiff, authorized by warrant under his hand, or that of his attorney duly constituted ; and if such person cannot write, his signature to the warrant shall be attested by

having first obtained the warrant mentioned (s. 1) in duplicate, or neglecting and refusing to deliver one of such duplicates to the tenant or owner, as directed by s. 2.; or any person distraining for rent, and neglecting or refusing to make out and deliver or post up the inventory, (s. 3); or charging more for any distress or sale than is authorized by the Act; or refusing to give such account, in writing, of any sale to the tenant or owner on demand, as provided by s. 4.

P. Fine not exc. £50: to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22. See "Abattoir," *ante*, p. 1; and "Justices, Recovery of Fines," *post*, where s. 1 of 5 W. IV., No. 22, is given at length; and *ex parte* Cockburn, *post*, Part III.

DOGS.

See "ANIMALS," "LARCENY."

1.—DOG STEALING. 2.—DOG REGISTRATION.

1.—DOG STEALING.

S. 8 & 9 Vic., c. 47, s. 2, (*adopted by 14 Vic., No. 16*). [*Two Justices*].—(1). *Stealing*.—Any person stealing any dog.

MEM.—*Person found committing the offence, or offering to sell dog, may be apprehended without warrant.* S. 5. (z)

P. *First Offence*.—Impr., with or without h. l., not exc. 6 cal. m.; or forfeit over and above the value of the dog not exc. £20. (A) In default of immediate payment, or within period appointed, impr., with or without h. l., not exc. 2 cal. m. where penalty or value, or both, with costs, not exc. £5; for not exc. 4 cal. m. where same not exc. £10; and for not exc. 6 cal. m. in any other case, unless sooner paid. (S. 8).

Second and subsequent Offence.—Indictable misdemeanor. (S. 2).

a Justice, Attorney, or Clerk of Petty Sessions. By s. 2, The bailiff or agent is to procure two copies of the warrant, both of which shall be signed as aforesaid, and give one copy at the time of distraining to the person distrained on, or some one for him, resident on the premises; and, if no one on premises, to the tenant or owner on demand, within a month after making such distress. By s. 3, The distrainer shall forthwith make a written inventory, dated and signed, and shall deliver the same, as provided in the case of the warrant, except that, if there is no one on the premises, the inventory shall be posted up on some conspicuous part thereof. By s. 4, Goods distrained for any rent may be sold after five days, if not replevied. By s. 8, Justices may grant replevin in certain cases. The necessary Forms are in the Schedule to the Act 15 Vic., No. 11. And see s. 7 of 19 Vic., No. 24, (*post*), as to the power conferred on Justices to deal summarily in cases of excessive distress, where the annual rent does not exceed £25. (See "Police").

(z) *Apprehension*.—Any person found committing any offence punishable either upon summary conviction, &c., by virtue of this Act, may be immediately apprehended without a warrant by any police officer, or by the owner of the dog, &c. And any person to whom any dog shall be offered to be sold or delivered, if he shall have reasonable cause to suspect that such dog has been stolen, is hereby authorized to apprehend, and forthwith convey before a Justice of the Peace, the party offering the same, together with such dog, to be dealt with according to law. (8 & 9 Vic., c. 47, s. 5).

(A) This section contains no provisions for the restoration of the dog, such as is given (in s. 3) in the case of a person knowingly possessing a stolen dog. See offence (2), *infra*.

S. 8 & 9 Vic., c. 47, s. 3, (adopted by 14 Vic., No. 16). [Two Justices].
 —(2) *Knowingly possessing, &c.*—Any person in whose possession, or on whose premises, any dog, or the skin thereof, shall be found by virtue of a search warrant, (B) such person knowing that the dog has been stolen, or that the skin is the skin of a stolen dog.

P. (1st Offence)—Fine not exc. £20; in default of payment, impr., as in offence (1).

(2nd and subsequent Offence)—Misdemeanor. (C)

M. 8 & 9 Vic., c. 47, s. 6, (adopted by 14 Vic., No. 16. Bail comp.—Any person corruptly taking any money or reward, directly or indirectly, to aid any person in recovering any stolen dog, or dog in the possession of any person not the owner thereof.

P. Fine or impr., or both. (D)

2.—DOG REGISTRATION.

S. 6 W. IV., No. 4, s. 1. [One Justice].—(1) Any person keeping any dog within the boundaries or reputed boundaries of Sydney, and all towns to which the provisions of this Act have been extended, for fourteen days, without causing a description of every such dog to be registered, and such registration (E) to be renewed from year to year. (F)

(B) *Search Warrant*.—If any credible witness shall prove, upon oath, before a Justice of the Peace, a reasonable cause to suspect that any person has in his possession, or on his premises, any stolen dog, such Justice may grant a warrant to search for such dog. (S. 5). The Justice by whom the search warrant is granted may restore the dog or skin to the owner. (S. 3). It may be remarked, that when a Justice is authorized to grant a search warrant, "as in a case of stolen goods," (see 7 & 8 Geo. IV., c. 29, s. 63), the warrant will authorize the apprehension of the person in whose possession the goods are found, (see 5 B. J. P., p. 843); but the search warrant authorized by 8 & 9 Vic., c. 47, s. 5, is not stated to be issued as in the case of stolen goods; it is doubtful, therefore, if the person in whose possession the stolen dog is found, can be apprehended by virtue of the search warrant. (See Arnold, S. C., 251). It is worthy of consideration, also, that s. 5 authorizes the issue of a search warrant for a stolen dog, but not for the skin of a stolen dog; consequently, as the skin's being found in the offender's possession by virtue of a search warrant, is of the offences enacted by s. 3, (see offence 2), no person can be convicted of, or apprehended for, having the skin of a stolen dog in his possession. Section 5 appears inconsistent in other respects: it authorizes one Justice to deal with the case of a person brought before him for having possession of a stolen dog, while ss. 2 & 3 empower "two or more Justices" to convict. (For Forms of Complaint for Search Warrant, and Search Warrant, see Forms, post, Part II).

(C) This section does not specify that a second offence shall be an indictable misdemeanor, as in the case of stealing a dog. (See offence (1) *supra*).

(D) *Offenders remanded or bailed*.—Any Justice may, if he think fit, remand, or suffer to go at large, with or without sureties, on his personal recognizance, any person charged with any offence or misdemeanor punishable by this Act, whether the same be punishable by summary conviction, or as an indictable misdemeanor. (S. 7).

(E) *Mode of Registering*.—The registration shall be made by the owner or keeper of the dog delivering, at the Police Office or Office of Petty Sessions of the town in which it is intended to be kept, a description of the dog, according to the form in Schedule A, with a declaration thereunder of the truth thereof; to be in force till the 30th day of September next ensuing, unless made in the month of September, and then till the 30th day of September in the year next ensuing. (S. 2). The Act does not apply to dogs less than six months old, or which shall not have

P. Fine 20s.—10s. for each dog : (g) recoverable either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22 ; see *ex parte* Cockburn, *post*, Part III., and "Abattoir," *ante*, p. 1, and "Justices," *post*, where 5 W. IV., No. 22, s. 1, is given in full.

S. *Id.* s. 3. [*One Justice*].—(2) Any person wilfully inserting or omitting, or wilfully causing or permitting to be inserted or omitted, in such description, (see s. 2), any matter or thing whatsoever contrary to or for the purpose of concealing the truth.

P. Fine 20s.—10s. : recoverable as offence (1).

S. *Id.*, s. 4. [*One Justice*].—(3) Any Clerk of the Police Office or Petty Sessions, on being required, refusing or neglecting to give a copy of the registration, certified under his hand, and receipt for the sum paid. (See Schedules B & C, Forms, Part II., *post*). (h)

P. Fine 10s. : recoverable as offence (1).

S. *Id.*, s. 8. [*One Justice*].—(4) The owner or keeper of any dog that shall in any street of the said towns, (s. 1), or upon any highway in any part of the said Colony, rush at or attack any person, or horse, or bullock, whereby the life or limbs of any person shall be endangered or property injured.

P. Fine £5—£1, over and above the amount of the damage sustained : (i) (k) recoverable as offence (1).

been kept for fourteen days ; proof thereof to lie on the owner or keeper. (S. 1). At time of registration, the fees in Schedule B to be paid to the Clerk of the Police Office or Petty Sessions. (S. 4). Until such amount shall have been paid, no registration shall be deemed to be duly made.

(F) *Evidence—Proof of Registration*.—In proceedings under this Act, the proof of due registration rests on the defendant. (S. 5). A certified copy of such registration, under the hand of the Clerk of the Police Office or Petty Sessions where the same was made, shall be equivalent to the original ; such Clerk shall keep a list of the names of all persons who have registered dogs during the current year ; and all persons applying for particulars of registry are entitled to receive the same, on payment of sixpence. (S. 6).

(g) *Appeal, &c.*—Appeal is allowed where the penalty exceeds £5. The complaint must be made within one month next after the time the offence shall have been committed. (S. 17). (See "Appeal," *ante*, p. 7).

(h) *Dogs not registered, &c., to be killed*.—All dogs not registered may be seized and killed by a Magistrate's order, on the owner being summoned, and failing, within a reasonable time, to claim the same. All dogs at large without collars with owner's name and address, or not in the immediate control of some competent person ; and all bull-dogs, mastiffs, and mongrels of either, at large without proper muzzles in addition to such collar, may be immediately destroyed ; and all persons are authorized, and all constables especially required, to seize, kill, and destroy every such dog so found at large. (S. 7). For every unregistered dog seized or destroyed under this Act, a reward of 2s. 6d. shall be paid, on proof to the Police Magistrate, or any Justice, of its being so seized or destroyed by the applicant for such reward within the boundaries of one of the said towns, and of its being immediately removed or buried, or disposed of otherwise, so as to prevent a nuisance ; and wherever a reward shall be claimed for the destruction of any dog, the applicant shall produce the tail, to be burned or otherwise destroyed in presence of such P. M. or Justice, or some duly appointed person. (S. 9).

(i) *Decision*.—By Common Law, if a man keep a savage dog, with knowledge of its vice, and allow it to frequent public places without its being muzzled or otherwise guarded, he is indictable for it as a common nuisance. (1 Arch. J., p. 348).

(k) *Exceptions—Sheep-Dogs, &c.*—This Act does not apply to sheep or cattle

S. Id., s. 12. [One Justice].—(5) Any constable failing or neglecting to report to Justices any dog being kept without being registered. (L) (See "Constable").

P. Fine 20s.—10s. for every such dog : recoverable as offence (1).

S. Id., s. 13. [One Justice].—(6) Any constable neglecting to destroy, or to use his best endeavours to destroy, every dog which he shall find at large contrary to the provisions of this Act.

P. Fine 20s.—10s. : recoverable as offence (1).

S. Id., s. 14. [One Justice].—(7) Any constable or other person wilfully or maliciously killing or destroying any dog which shall not be at large contrary to the provisions of this Act.

P. Fine £5—£1, and also the full value of the dog to the owner. Fine recoverable as offence (1).

S. 15 Vic., No. 24, s. 21. [One Justice].—(8) Any person being the keeper of or having any dog or other animal, which shall attack and endanger the life or limb of any person who may have the right-of-way or use of any private yard, alley, street, or any other place.

P. Fine not exc. £2. (See "Police," for mode of recovery of penalty).

DRUNKENNESS.

See "POLICE," "PUBLICAN," "VAGRANT."

S. 13 Vic., No. 29, s. 62, (Publicans' Act). [One Justice].—(1) Any person being found drunk (M) and disorderly in any highway, street, road, or public place.

P. Fine not exc. £2 ; and if such sum and costs be not forthwith paid, the offender to be forthwith committed to the house of correction, to be kept in s. c. for not exc. 48 hours, unless the fine be sooner paid.

N.B.—*The complaint must be made within one week, by any person, and may be without formal information.*

S. 15 Vic., No. 4, s. 2, (Vagrant Act). [One Justice].—(2) Every habitual drunkard, having been thrice convicted of drunkenness within the preceding twelve months, who, in any street or public highway, or being in any place of public resort, shall behave in a riotous or indecent manner, shall be deemed an idle and disorderly person.

dogs, or any dog accompanying a cart, &c., through a town, if securely chained and muzzled, unless the dog be usually kept in the town. (S. 11).

*Fees].—*All fees received under this Act, shall be accounted for as directed by 4 W. IV., No. 5. (S. 15). See "Fees."

(L) *Evidence—Ownership].—*Every dog shall be deemed to be kept by the person in actual occupation of the house or premises upon which such dog shall be found, unless reasonable proof to the contrary be adduced by the defendant ; and the person by whom the dog shall be ordinarily kept, shall be liable as keeper, whether kept for his own use or that of another ; and any dog kept or used by a servant, shall be deemed to be kept by his master or employer for the time being. (S. 10).

(M) By s. 61, Any constable or peace-officer, in any part of New South Wales, may apprehend any person whom he shall find drunk in any highway, street, road, or public place, and convey such person before a Justice, to be dealt with according to law ; and see 2 Vic., No. 2, (Police Act), s. 6. For Form of warrant upon conviction for being drunk and disorderly, see Forms in this volume, and s. 24 of 19 Vic., No. 24, (Police Act).

P. Impr., with h. l., not exc. 2 yrs. See "Vagrant."

S. 13 *Vic.*, No. 29, s. 64. [*One Justice*].—(3). Any licensed person, or any storekeeper or other dealer in spirituous or fermented liquors, during any Justice's prohibition, after service of a copy thereof upon him or her, or with a knowledge thereof in any other manner acquired, selling to any prohibited person any spirituous or fermented liquor. (N)

P. Fine not exc. £10. How to be recovered, see "Publican."

S. *Id.*, s. 65. [*Two Justices*].—(4) Any person, with a knowledge of such prohibition, giving, selling, purchasing, or procuring for or on behalf of such prohibited person, or for his or her use, any such spirituous or fermented liquors.

P. Fine not exc. £5. How to be recovered, see "Publican."

S. 21 *James I.*, c. 7, ss. 1 & 3. (o) [*One Justice*].—(5) Any person being drunk.

(N) S. 63. When it shall be made to appear that any person shall, by excessive drinking of spirituous and fermented liquors, so mis-spend, waste, or lessen his or her estate, as thereby to expose himself or herself, or his or her family, to want or indigent circumstances, or greatly to injure his or her health, or endanger the loss thereof, the Justices of the city, town, or district in which such drunkard shall reside, in Petty Sessions assembled, shall, in writing under the hands of any two such Justices, forbid all persons licensed under this Act, and also all storekeepers or other dealers in such liquors, to sell to him or her any spirituous or fermented liquors for the space of one year; and such Justices, or any other two Justices of the Petty Sessions of such district, may, at the same or any other time, in like manner forbid the selling of any such liquors to the said drunkard by any such licensed persons, storekeepers, or other dealers, of any other city, town, or district to which the drunkard shall or may be likely to resort for the same.

S. 64. The said Justices of Petty Sessions, or any two of them, shall in like manner from year to year renew any such prohibition as aforesaid, to all such persons as have not, in their opinion, reformed within the year.

(o) It appears somewhat doubtful whether simple drunkenness is, at the present day, an offence punishable on summary conviction.

By 1 Jac. I., c. 9, (an Act to restrain the inordinate haunting and tippling in inns, alehouses, and other victualling houses), it was enacted (s. 2) that no innkeeper, &c., should permit any person inhabiting in any city, village, &c., where such inn was, to remain drinking or tippling in the said inn, &c., other than certain excepted persons, under a penalty of 10s.; the offence being viewed by any Justice or proved by two witnesses. This Act was to continue to the end of the first session of the next Parliament. (S. 5).

The 4 Jac. I., c. 5, (an Act for repressing the odious and loathsome sin of drunkenness), after a very energetic preamble, enacted (s. 2) that every person which should be drunk, and of the same offence of drunkenness should be lawfully convicted, should forfeit 5s., to be paid within one week after conviction; the forfeiture was to be levied by distress, and if the offender was not able to pay, he was to be committed to the stocks for six hours. Sect. 4 imposed a penalty upon any person who should remain drinking or tippling in any inn, &c., in the same city, &c., wherein the offender dwelt. By s. 6, If any person, being once lawfully convicted of the said offence of drunkenness, should, after that, be again lawfully convicted of the like offence of drunkenness, he should be bound, with two sureties, to be from thenceforth of good behaviour. This Act was to continue until the end of the first session of the next Parliament. (S. 11). It does not contain any provision as to the proof of drunkenness.

The 21 Jac. I., c. 7, (an Act for the better repressing of drunkenness, and restraining the inordinate haunting of inns, &c.), after reciting the two last mentioned statutes, by s. 1, makes them perpetual, and enacts that proof of one witness shall be sufficient. S. 2 extends the provisions of 4 Jac. I., c. 5, s. 4, against persons remaining drinking in inns in their own city, to any other person, where-

MEM.—The conviction may be on view of a Justice. See Note (o) as to costs and period of imprisonment. For a third offence, offender might have

soever his habitation may be. S. 3 enacts that any Justice, upon view, confession, or proof of one witness, may convict any person of the offence of drunkenness, under a forfeiture of 5s.; and the same to be levied, or the offender otherwise punished, as in the said statute (*sic*) was appointed; and, for the second offence, he should become bound to be of good behaviour, as if he had been convicted in open sessions. S. 4 enacts that an alehouse-keeper offending should be disabled from keeping an alehouse for three years.

The 9 G. IV., c. 61, (to regulate the granting of licenses to keepers of inns, &c.), by s. 35, repeals, *inter alia*, 1 Jac. I., c. 9, 4 Jac. I., c. 5, and a. 4 of 21 Jac. I., c. 7, leaving the remainder of the last-mentioned statute unrepealed.

It will be seen, then, that the Act creating the offence of drunkenness, (4 Jac. I., c. 5), is repealed. The 21 Jac. I., c. 7, s. 3, refers indeed to 4 Jac. I., c. 5, to show the penalty to be incurred for the offence of drunkenness, and how that penalty is to be enforced, differing in no respect from the provisions of 4 Jac. I., c. 5. Now, if the last-mentioned statute had never been passed, the language of 21 Jac. I., c. 7, s. 3, would, perhaps, have been sufficient to create "the offence of drunkenness"; but these words in the last-mentioned statute appear to have no other meaning than "the said offence of drunkenness," or "the like offence of drunkenness," in 4 Jac. I., c. 5, s. 6, and to refer, therefore, to the offence created by the former statute, which has since been repealed.

It was laid down by Lord Tenterden, C. J., in *Surtees v. Ellison*, 9 B. & C., 752, as a general rule, that when an Act of Parliament is repealed, it must be considered, (except as to transactions passed and closed), as if it had never existed. This rule, however, must be taken with the modification, that where an Act of Parliament directs a mode of procedure to be adopted as contained in a former Act, the repeal of the former Act does not operate to repeal the procedure directed, which is to be considered as incorporated in the latter Act. (*Reg. v. Stock*, 8 Ad. & E., 405).

If, then, the 21 Jac. I., c. 7, s. 3, created a new offence, and directed the penalty and procedure to be enforced as under 4 Jac. I., c. 5, the repeal of that last-mentioned Act would not repeal the method of procedure; but if, as above suggested, the offence is created by the former Act, the repeal of this would abolish the offence altogether.

It is to be observed, also, that, in furtherance of this view, the 21 Jac. I., c. 7, was passed to make perpetual the former Act, (4 Jac. I., c. 5); but that Act having been repealed, it would seem that the Act to perpetuate it must fall with it.

On the other hand, it may be contended that, inasmuch as 9 G. IV., c. 61, repeals only a part of 21 Jac. I., c. 7, the Legislature may be supposed to have intended that the unrepealed portion of the statute was to remain in force. (See Arnold, *Sum. Convictions*, p. 134).

This Act of James was recognized as still in force by the former Licensed Publican Act, 3 Vic., No. 18, (see ss. 66 & 68); but it is not referred to at all by the existing Act, 13 Vic., No. 29.

The rule on this subject is thus laid down by Dwaris:—"It is a general rule that subsequent statutes which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words." (p. 532).

Observations on Recovery of Costs.—A week must elapse between the conviction and the issue of the distress warrant; neither can the defendant be committed to the stocks forthwith if he confesses he has no goods. Costs can now be recovered by distress, with the penalty, under 11' & 12 Vic., c. 43, ss. 18 & 19. The putting in the stocks is in substitution of the pecuniary penalty, when that cannot be levied, not a means provided for recovering the penalty; and cannot be sooner terminated by payment of penalty or costs, as in ordinary cases. A Justice is not authorized in ordering the offender to be put in the stocks for non-payment of costs. (See *R. v. Barton*, 13 Q. B., 391; decided upon a recent conviction under 29 Car. 2, c. 7, s. 1, in which it was so held). See, *post*, "Sunday".

been punished as upon a second conviction, for the punishment does not operate to purge the two previous offences.

P. *First Offence*—5s. : to be paid within one week, or levied by distress ; or if not able to pay, commitment to the stocks for six hours.

Second Conviction—Bound in recognizance with two sureties in £10, to be thenceforth of good behaviour ; in default, committal for a definite period adjudged. (P)

DUELLING.

See "CHALLENGE."

ELECTORAL ACT.

See "BRIBERY."

S. 22 Vic., No. 20, s. 50. [*Two Justices*].—(1) Any person wilfully misleading any Collector or Clerk of Petty Sessions in the collection or preparation of the lists, or wilfully causing any false or fictitious name or qualification to be inserted therein.

P. Fine not exc. £20, or impr. not exc. 1 mth. : to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of W. IV., No. 22. (See, *ante*, "Abattoir," p. 1 ; "Justices, Recovery of Penalties," and *ex parte* Cockburn, *post*, Part III.)

N.B.—*No prosecution for offences under this statute to be commenced after the expiration of 6 mths. from the commission of such offence.* (S. 86).

S. *Id.*, s. 65. [*One Justice*].—(2) Any Returning Officer, after having accepted office, wilfully neglecting or refusing to perform any of the duties which by the provisions of this Act he is required to perform.

P. Fine not exc. £200 : recoverable as offence (1).

N.B.—*The Governor, with the advice of the Executive Council, may mitigate or wholly remit the fine.*

S. *Id.*, s. 65. [*One Justice*].—(3) Any Justice presiding, or other Officer or person, wilfully neglecting or refusing to perform his duties, &c.

P. Fine not exc. £50 : recoverable as offence (1), with full costs of suit, to be sued for within 6 mths. after the commission of the offence.

N.B.—*The Governor has like discretion as in last offence.*

M. 22 Vic., No. 20, s. 49. *Bail disc.*—(1) Any person wilfully making a false answer to any of the questions prescribed by s. 46, or wilfully making a false declaration, (see s. 48 and Sch. K), or wilfully making any false statement, orally or in writing, in any Court of Revision, in anywise

(P) *Power to commit in default of Surety for Second Offence*.—The power to commit in default of finding surety is not in the statute, but the authority to do so is given by the Common Law, and is thus laid down by Hawkins, (2 J. P., c. 16, s. 2). "Whosoever a Justice is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the Justice may commit him to the gaol, to remain there till he shall comply." In 2 Hale, 136, it is said that the party should be bound to appear at the Sessions, to abide the order of the Court. As to the costs upon this second conviction, they would seem to be recoverable under s. 18 of 11 & 12 Vic., c. 43, which imposes an additional imprisonment of one cal. m. for them where no penalty is to be recovered.

affecting or relating to the qualification of himself or any other person.

P. The same as in wilful and corrupt perjury. (See "Perjury").

M. Id., s. 64. Bail comp.—(2) Any person voting a second time, or attempting to vote a second time, at the same Election for the same Electoral District, or personating or attempting to personate any other person for the purpose of voting at any Election.

P. Fine not exc. £200, or impr., with or without h. l., for not exc. 2 yrs. (See "Bribery").

M. Id., s. 64. Bail comp.—(3) Any person being disqualified for any of the causes mentioned in the Act, (see s. 11, and Act, *passim*), and voting or attempting to vote at any Election.

P. The same as offence (2).

M. Id., s. 73. Bail disc.—(4) Any person wilfully or knowingly giving false evidence before Election Committee, or a quorum thereof, or in any affidavit relating to any matter referred to such Committee, and taken before any Justice; (and see 16 Vic., No. 18).

P. The same as in perjury. (See "Perjury").

M. Id., s. 73. Bail comp.—(5) Any person summoned by an Election Committee, disobeying such summons,—or refusing or neglecting to produce any papers, records, or other documentary evidence, relating to or affecting the matter under investigation, which shall have been sent for by the said Committee,—or refusing to submit himself for examination,—or giving false evidence,—or prevaricating,—or otherwise misconducting himself in giving or refusing to give evidence.

P. Fine or impr., or both.

ELECTRIC TELEGRAPH.

S. 20 Vic., No. 41, s. 8. [Two Justices]—(1) Any officer not transmitting and delivering messages in the order in which they are received by the Manager or other officer in charge of the Station at which they shall be received.

P. Fine not exc. £20: to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No 22. See, *ante*, "Abattoir," and, *post*, "Justices, Recovery of Fines," and *ex parte* Cockburn, *post*, Part III.

N.B.—*Messages relating to the arrest of criminals, the discovery or prevention of crime, or any other matter connected with the Administration of Justice, and all Government Despatches, when so required, shall have priority over all other messages.* (S. 8).

S. Id., s. 9. [Two Justices]—(2) Any officer, clerk, or other person employed in working any line, divulging the contents or substance of any private or secret despatch, message, or other communication, transmitted or intended to be transmitted by any such line.

P. Fine not exc. £100, or impr., with or without h. l., not exc. 6 mths.: fine recoverable as offence (1).

S. Id., s. 11. (q) [Two Justices]—(3) Any person wilfully obstructing

[q] *Apprehension—Damages*.—By s. 12, Any person may apprehend without warrant any other person found offending against ss. 10 & 11, (offences 3 & *M.*);

In a case in the Central Criminal Court, Sydney, 1847, the prisoner was the accountant of the Bank, and on one occasion, during the temporary absence of the receiving teller, officiated for him, and received a sum of money as a deposit, which he appropriated to his own use. It was proved that it was no part of his duty to officiate as teller during the absence of the proper officer, and that he had committed an act of irregularity in doing so; the Court held this not to be embezzlement, as the prisoner had accomplished his fraud not by virtue of his employment, but in opposition to it. (*R. v. Townend*).

F. 7 & 8 G. IV., c. 29, s. 47. (s) Bail disc.—(1) Embezzlement by any clerk or servant, or any person employed in that capacity, of any chattel, money, or valuable security received by virtue of his employment.

P. Tr. 14—7 yrs.; or impr. not exc. 3 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr. 5—2 yrs., h. or l. l. and s. c.

F. 9 Vic., No. 2, s. 1. Bail disc.—(2) Any person employed in the service of H. M., and entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, (T) and embezzling the same, or any part thereof, or in any manner fraudulently applying or disposing of the same or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service, shall be deemed to have stolen the same.

P. Tr. 14—7 yrs.; or impr., with or without h. l., not exc. 3 yrs.; or (*if male*) h. l. on roads 10—5 yrs.

N.B.—*There are numerous other offences by officers in different institutions and in public offices, for which see Statutes, and Arch. Cr. Pl., 360. See, post, "Manufacture," as to frauds, &c., by manufacturers.*

EMBRACERY.

See "JURORS."

(s) The indictment may charge any number of distinct acts of embezzlement, not exceeding three, committed by the offender against the same master, within 6 cal. m. from the first to the last of such acts; and if the embezzlement is of coins or valuable security, it may be alleged as money, (s. 48); and so with bank notes. (16 Vic., No. 18, s. 19). Upon an indictment for this offence, the Jury may find the prisoner not guilty of this offence, but guilty of simple larceny, or of larceny as a clerk or servant, and he shall be punished as if he had been indicted for such larceny. (*Id.*, s. 13).

(T) Section 2 gives a very comprehensive list of what are to be deemed "valuable securities" under this Act.

By s. 3. Different acts of embezzlement, &c., not exceeding three, which may have been committed by him within the space of 6 cal. m., from the first to the last of such acts; and in the information, &c., where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security, and such allegation shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; (and see 16 Vic., No. 18, s. 18); and by s. 4, in the information, &c., the property of any such chattel, &c., may be laid in H. M. the Queen.

ENTRY (FORCIBLE) AND DETAINER.

The assertion of right to lands or houses by force has been always discouraged by the Courts, from a just apprehension of the tumults to which such proceedings may lead.

Although no indictment will lie for a mere trespass, accompanied by constructive force, yet it seems to be established that an entry on land, or into a house, garden, &c., or a church, though no one be therein, with such actual violence as amounts to an illegal act, or public breach of the peace, (*e g.*, bringing unusual weapons, threatening violence, breaking open a door), is an offence indictable at Common Law as a forcible entry; though certain statutes give other remedies to the party grieved, viz.,—restitution and damages; and that the illegal and violent maintenance of possession, if the entry was unlawful, is, in like manner, indictable as forcible detainer; to sustain such indictment at Common Law, no circumstances of great public violence or terror are necessary.

In addition to the punishment annexed to the offence at Common Law, certain statutes provided that restitution also should be granted to the party dispossessed on the conviction of the offender. 15 R. II., c. 2, authorized the summary commitment of the offender till fine and ransom; and by 8 H. VI., c. 9., this provision was extended to cases of forcible detainer, and Justices of the Peace were empowered to restore the premises to the former possessor, where the force had been found by a jury summoned by them, (*R. v. Harland*, 8 Ad. & E., 826); (v) and 21 Jac. I., c. 25, applied the power conferred by the former Acts to the restitution of possession of which tenants for terms of years, &c., had been forcibly deprived. On this account the prosecutor's interest in the premises must be stated in the indictment. (v) Now, therefore, a prosecutor, who is a freeholder or leaseholder, &c., may have restitution, on conviction of the party of whose dispossession he complains. This restitution may be awarded by the Court of Quarter Sessions, as Justices of the Peace are expressly empowered to grant it; in this respect they act as Judges of Record, and have greater power than Judges of Oyer and Terminer and Gaol Delivery, who cannot grant restitution, but can only punish the offender. The great distinction is, that on an indictment at Common Law, the prosecutor needs only to prove a *peaceable possession* at the time of the ouster; while in an indictment on the statute of Richard, his interest, viz., a seisin in fee, must be allowed; on that of James, the existence of a term or other tenancy; and on these statutes, restitution will be granted. It must be observed, that even on these statutes proof that the prosecutor holds colourably as a freeholder or leaseholder will suffice; and that the Court will not, on the trial, enter into the validity of an adverse claim made by the defendant, which he ought to assert, not by force, but by action. (*Dick.*, Q. S., 378).

In order to justify a conviction by Justices under 15 R. II., c. 2, and 8 H. VI., c. 9, it must be proved before them that there was, as well

(v) The inquisition must set forth the estate possessed by the party in the property disputed. (*R. v. Bowman*, 8 D. P. C., 128).

(v) It being doubted whether, on these statutes, any but a freeholder could have restitution.

as an unlawful entry on the premises, a forcible detainer. Where a conviction stated that Justices had convicted G. A. of forcible detainer upon their own view, and that afterwards a complaint was made to the Justices that G. A. forcibly entered the premises, and that notice of such complaint was given to G. A., who received the notice, but said nothing, and then went on to allege that the Justices received evidence, on oath, of the unlawful entry: Held, that the conviction was bad, for not showing that G. A. had been summoned to answer the charge of the unlawful entry, or that he had any opportunity afforded him of defending himself against such charge. (*Attwood v. Jolliffe*, 3 New Sess. C., 116).

For Forms, see Dick., Q. S.

M. 5 Ric. II., c. 8; 15 Ric. II., c. 2; 21 Jac. I., c. 15; 8 H. VI., c. 9. Bail comp.—(1) Entry (forcible) and detainer into a freehold or leasehold.

P. Impr. and ransom at King's will; restitution of property. (See 31 Eliz., c. 2.)

M. at Com Law. Bail comp.—(2) Entry (forcible) and detainer.

P. Fine or impr., or both. (1 Hawk., c. 64, s. 28).

M. 15 Ric. II., c. 2. Bail comp.—(3) Not assisting Justices in arresting persons holding forcible possession.

P. Fine and impr.

ESCAPE, PRISON-BREACH, AND RESCUE.

See "FELONS ABSCONDING," "GAOL."

S. 17 Vic., No. 15, s. 2. [One Justice].—(1) Any offender sentenced by Justices to be imprisoned with h. l. for not exc. 14 days, refusing or neglecting to perform such h. l. according to Justices' directions, or escaping, or attempting to escape.

P. Impr. and h. l. for further period of not exc. 14 days.

S. Id., s. 3. [Two Justices].—(2) Any person (excepting those in charge or duly authorized, see s. 3), communicating in any manner with such offender, or loitering near, (after being warned to leave), or endeavouring to communicate with such offender whilst employed.

P. Fine not exc. £5; or, in default of payment, impr. not exc. 1 mth. (11 & 12 Vic., c. 43, s. 23).

F. 25 G. II. Bail disc.—(1) Rescuing a murderer, or his body after execution.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l. and s. c., (1 Vic., c. 91, s. 2, and 16 Vic., No. 18, s. 28); or (*if male*) h. l. on roads 15—7 yrs.

F. or M. at Com Law.—(2) Officer having a person in charge for felony, voluntarily permitting his escape.

P. (*If felony*), the same as the party escaping was sentenced to; (*if misdemeanour*), fine and impr. (4 Black. Com., 430; 1 Hale, 234; 2 Hawk., c. 19, s. 22).

N.B.—*A negligent escape by an officer is punishable by fine only, (2 Hawk., c. 19, s. 31); but, if a private person, fine or imprisonment, or both. (Id., c. 20, s. 6). See Note (w), p. 99.*

F. 1 Edw. II., c. 2, s. 1. Bail disc.—(3) Breaking prison, when in custody for a capital offence.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w. (7 & 8 G. IV., c. 28, ss. 8 & 9); h. l. on roads 5—3 yrs.

M. Id. Bail comp.—(4) The like on a minor charge.

P. Fine and impr., and h. l. (2 Hawk., c. 18, s. 21).

F. 4 Vic., No. 29, s. 14. Bail disc.—(5) Conveying mask, &c., into a prison, to aid and assist prisoner to escape.

P. Tr. not exc. 14 yrs.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr. 5—2 yrs., h. l. and s. c.

F. Id. Bail disc.—(6) Aiding and assisting, by any means whatsoever, any prisoner to escape or in attempting to escape.

P. The same.

M. 9 G. IV., c. 83, s. 34. Bail comp.—(7) Contriving, aiding, assisting, or abetting in the escape or intended escape of any transported felons from Australia or V. D. Land.

P. Fine not exc. £500, or impr. not. exc. 2 yrs., or both.

M. at Com. Law. Bail comp.—(8) Rescuing a prisoner from custody when not convicted, or convicted only of a misdemeanor.

P. Fine or impr., or both. (2 Hawk., c. 21, s. 8).

F. at Com. Law. Bail disc.—(9) The like, when charged and convicted of treason or felony.

P. Same as principal; or impr. not exc. 4 yrs. (1 & 2 G. IV., c. 88, s. 1); (4 Bl. C., 131).

F. 16 G. II., c. 31, ss. 1—3. Bail disc.—(10) Aiding or assisting a prisoner or convict in custody for treason or felony, to make his escape while being conveyed to prison or in prison.

P. Tr. 7 yrs., or h. l. on roads 5—3 yrs.

M. Id., s. 3. Bail comp.—(11) The like in custody for petty larceny or for debt of £100.

P. Fine and impr.

M. at Com. Law. Bail comp.—(12) Rescuing goods in the custody of the law, or breaking open a pound.

P. Fine or impr., or both. (2 Hawk., c. 21, s. 20).

F. 22 Vic., No. 2, s. 3. (x) Bail disc.—(13) Any person escaping or attempting to escape from any person in whose charge he may be placed for the purpose of carrying out the h. l. portion of his sentence.

(w) It is felony if the party escaping have received judgment; but a misdemeanor, if before conviction. The officer, however, cannot be punished until after the original delinquent has been convicted, but before such conviction, he may be fined and imprisoned as for a misdemeanor. (Arch. Cr. Pl., 636). The imprisonment of the delinquent must be for some criminal matter, otherwise the escape is not punishable criminally. (*Id.*, 634).

By s. 28 of 15 Vic., No. 18, any person convicted of the misdemeanor, viz.:—an escape or rescue from lawful custody on a criminal charge, may be sentenced to imprisonment for any term now warranted by law, and also to be kept to h. l. during the whole or any part of such term.

(x) The Governor, by instrument in writing, may authorize the Sheriff or other officer in charge of any gaol to remove any prisoner under sentence of h. l. to any distance outside the walls, not exc. 2 miles, for the purpose of carrying out the labor portion of any sentence. (22 Vic., No. 2, s. 1).

P. H. l. on roads not exc. 5 yrs.; or impr., with or without h. l., for not exc. 3 yrs., in addition to any pending term of punishment. (v)

EVIDENCE.

See "CONFESSION," "JUSTICES."

- I. THE SUBSTANCE OF THE ISSUE. II. THE BEST EVIDENCE. III. SECONDARY EVIDENCE. IV. HEARSAY. V. WITNESSES; HUSBAND AND WIFE. VI. EXAMINATION AND CROSS-EXAMINATION. VII. WRITTEN EVIDENCE AND PRESUMPTIONS.

I. THE SUBSTANCE OF THE ISSUE.

The Facts constituting the offence, &c.—Offences at Common Law are defined by the rule of the Common Law relating to them; offences by statute are defined by the statute creating them. In both cases, everything stated in the definition of the offence is material, and must be proved; on the other hand, if anything stated in an Information, &c., be not included in the definition of the offence, it may be rejected as surplusage, and need not be proved. (*R. v. Evan Jones*, 2 B. & Ad., 611).

Intent.—The intent with which an act is done often forms a material part of the definition of the offence, and must be proved; it does not admit of positive proof; it can be proved only by the confession of the party, or by proving facts from which it may fairly be inferred.

Malice.—Malice often forms a material part of the definition of the offence; but this, like intent, can only be proved by the confession of the party, or by the proof of the facts from which it may be inferred; for instance, if a man, without any apparent motive, wilfully do an act which must necessarily be injurious to another, we are warranted in saying that he did it maliciously, unless he prove the contrary.

Guilty Knowledge.—A guilty knowledge of some particular fact must sometimes be proved; such, for instance, as uttering a forged instrument, *knowing it to be forged, &c.*; this guilty knowledge, like intent and malice, can only be proved by the party's confession, or by proving facts from which it can be inferred; for instance, where a man was charged with uttering a forged bill of exchange, knowing it to be forged, evidence

(v) By s. 4, any person lawfully placed in charge of any prisoner, (removed under the provisions of this Act outside the gaol, to carry out the labour portion of his sentence), wilfully or negligently permitting him to escape, is liable to all the like fines and penalties to which any constable, &c., is liable for a like offence, and shall, while so in charge, have all the powers and privileges by law appertaining to a constable.

With reference to felons convicted in this Colony, 18 Vic., No. 7, s. 1, provides that laws in force respecting felons from the United Kingdom, are applicable to felons convicted in the Colony of New South Wales.

Id., s. 2.—"As often as any felon or other offender convicted in the said Colony shall escape from lawful custody, or abscond from the district or other place to which, under regulations or conditions in that behalf made, he shall be restricted, although at the time of his apprehension or trial for such offence the original term of sentence may have expired, such felon or other offender may, notwithstanding, at any time, be apprehended, tried, and convicted of such escape or absconding, and shall be liable to be dealt with, in all respects, as persons escaping or absconding during any subsisting sentence are or may be liable to."



that he gave a false account as to the parties to it, and that, when he was apprehended, he had other forged bills in his possession, was received in proof of his guilty knowledge that the first bill was forged. (*R. v. Hough, R. & Ry.*, 120). So, that he had previously uttered other forged notes of the same description, would be good evidence of it. (*R. v. Ball, Id.*, 132; *R. v. Green*, 3 C. & K.; but see *R. v. Moore*, 1 Fost. & F., 73). In the same way, upon a charge of receiving stolen goods, knowing them to have been stolen, evidence that the party had at other times received goods from the prosecutor under suspicious circumstances, (*R. v. Dunn & Smith, Ry. & M.*, 146), or that he concealed the goods, or bought them for a price much under their value, or the like, may be received in proof of his guilty knowledge that they had been stolen. But, the fact that the prisoner has at various times received other property, stolen from different persons, cannot be given in evidence. (*R. v. Oddy*, 2 Den., 264). As to *variances and amendments*, see "Justices."

II. THE BEST EVIDENCE.

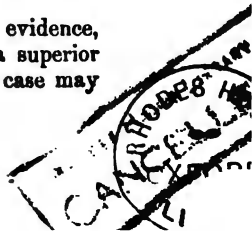
The best Evidence.—The best evidence of which the case in its nature is susceptible shall be adduced to prove every disputed fact. This rule is adopted for the prevention of fraud, for when better evidence is withheld, there is a presumption that the party has some motive for not producing it. In requiring the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is *merely substitutionary in its nature*, as long as the original evidence is attainable. Thus, depositions are in general admissible only after proof that the parties who made them cannot be produced. (B. N. P., 329). The rule only excludes evidence which itself indicates the existence of more original sources of information; and, therefore, where there is no substitution of inferior evidence, but only a selection of weaker, instead of stronger, proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed; for instance, in proof or disproof of handwriting, or in proof of the contents of a letter which cannot be produced, it is not necessary to call the supposed writer. (*R. v. Hurley, M. & R.*, 473).

This will lead to the division of Evidence into *Primary* and *Secondary*. Primary evidence is the best or highest evidence; it is that kind of proof which, in the eye of the law, affords the greatest certainty of the fact in question; until it is shown that the production of this evidence is out of the party's power, no other proof of the fact is, in general, admitted. All evidence, falling short of this in its degree, is termed *secondary*.

The cases which most frequently call for the application of this rule, are those which relate to the *substitution of oral for written evidence*; the general rule is, that the contents of a written instrument, which is capable of being produced, must be proved by the instrument itself, and not by parol evidence.

So also, except on special grounds, no declaration or entry by any person can be given in evidence, where the party who made such declaration or entry can be produced and examined as a witness.

The distinction refers, not to the measure and quantity of the evidence, but to its quality when compared with some other evidence of a superior degree. It is not necessary to give the fullest proof that every case may



admit of; although there be several eye-witnesses to a particular fact, it may be proved by the testimony of one only.

There may also be distinct sources of information, one of which may be oral, and another contained in writing; in such case, both will be *primary*, and, therefore, either will be admissible.

Exception, Admissions].—A tacit exception to this rule must be made in favour of the *parol admissions* of a party, and of his *acts amounting to admissions*, both of which species of proof are always received as primary evidence against himself and those claiming under him, although they relate to the contents of a deed or other instrument which are directly in issue in the cause. (*Farle v. Picken*, 5 C. & P., 542; *Darby v. Ouseley*, 25 L. J. Ex., 227; & *Slatterie v. Pooley*, 6 M. & W., 664).

If the written instrument be in the hands of the opposite party, who withholds it at the trial, secondary evidence will be admitted, provided that a notice, verbal or in writing, to produce the original has been duly served, where such notice is requisite. But if, from the nature of the action or indictment, the defendant must know that he will be charged with the possession of the instrument, and be called on to produce it, no notice to produce need be served upon him.

Where a person is indicted for stealing a bill, its identity may be proved by parol evidence, though no notice to produce it has been served on the prisoner or his agent. (*R. v. Aickles*, 1 Lea, 294). If, however, the indictment be for forgery, and the forged instrument be in the hands of the prisoner, the prosecutor must serve him or his attorney with a notice to produce it, before he can offer secondary evidence of its contents. (*R. v. Haworth*, 4 C. & P. 294). But, see *R. v. Downham*, 1 Fost. & F., 387, whether service on the attorney is sufficient.

III. SECONDARY EVIDENCE.

Secondary Evidence].—But if such original evidence is destroyed, if it cannot be found after diligent search, or if the opposite party refuse to produce it after having received due notice, then secondary evidence of its contents is admissible. (z) If, however, it exists in the hands of a stranger, who, although not privileged to do so, refuses to produce it, it seems that secondary evidence cannot be admitted, but such contumacious witness must be punished.

Depositions].—Bearing in mind the broad proposition, that secondary evidence is only admissible where the production of primary evidence is out of the party's power, it is laid down, that, in a matter between the same parties, the depositions of a witness under oath, in a judicial proceeding, may be used on a subsequent suit between the same parties, or those claiming under them, if the witness be dead, or if he be sought for and cannot be found, or if he have been subpoenaed and have fallen sick, or

(z) The Court must be satisfied, by evidence, that the original is lost, or that, after diligent search for it, it cannot be found; and parol evidence to this effect must be given by those who, at one time, had the custody of the original, or by those legally entitled to its custody, or those likely to have it. (*R. v. Stourbridge*, 8 B. & C., 96). It is not necessary that the evidence should prove the destruction of the instrument; if it prove such diligence in searching for it as to relieve the party of all charge of *laches* in not making further inquiry, it will be sufficient. *R. v. Morton*, 4 M. & S., 48).

when kept out of the way by the contrivance of the opposite party ; thus, a deposition taken on a charge either of assault or robbery, or of stabbing, or of doing grievous bodily harm, can, after the death of the witness, be read upon a trial for murder, where the two charges relate to the same transaction. (*R. v. Smith*, R. & R., 339 ; *R. v. Beeston*, 24 L. J. M. C., 5).

With regard to the depositions before Magistrates, see title "Justice," and 11 & 12 Vic., c. 42.

IV. HEARSAY.

All hearsay evidence is, with a few exceptions, which will be noticed presently, inadmissible. *Hearsay* evidence is evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person ; it is not given on oath, or subject to cross-examination ; and even although it may have been on oath, yet, if the party on whose authority it rests could not be cross-examined *by the party to be affected by such evidence*, it is inadmissible.

In *Spargo v. Brown*, (9 B. & C., 935), the action was for excessive distress, and the question was, whether plaintiff was tenant to the defendant, Hugh Brown, or his brother, John Brown ; the plaintiff paid rent to John, but the defendant, to show that the rent had been paid to John as his (defendant's) agent, offered, in evidence, accounts tendered to him by John, in which John styled himself defendant's agent. It was objected that John Brown, not being dead, ought to have been called as a witness. The evidence was held to be inadmissible.

This rule operates, in the absence of special tests of truth, to the exclusion of all the acts, or declarations, or conduct of others, as evidence to bind third parties either directly or indirectly ; when, therefore, the witness begins to state either his own declarations and acts, or the declarations and acts of strangers, he should be asked *if the prisoner was present*, or had been an authorizing or assenting party ; and, if not, such statements are inadmissible.

It is necessary to distinguish between *hearsay evidence* and that which is deemed *original*. Thus, it often happens that the fact in controversy is, whether certain things were written or spoken, and *not* whether they are *true* ; thus the *replies* given to inquiries made at a bankrupt's residence, denying that he was at home, are original evidence, without examining the persons to whom the inquiries were addressed ; because the testimony of the parties inquiring is sufficient to establish the denial, which is the only material fact. Upon these grounds, evidence of *general reputation, reputed ownership, public rumour, general character, general notoriety*, and the like, though composed of the speeches of third persons not under oath, is original evidence, and not hearsay.

Whenever the *bodily or mental* feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are original evidence. Thus, on a trial for murder by poisoning, statements made by the deceased in conversation shortly before he took the poison, have been received in evidence for the purpose of proving the state of his health at that time ; and, on the same ground, in actions and indictments for assault, what a man has said about himself to

his surgeon has been admitted as evidence to show what he suffered by reason of the assault. (*R. v. Johnson*, 2 C. & K., 354; *Averson v. Lord Kinnaird*, 6 East, 198).

Certain *other declarations and acts* are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. Thus, on an indictment for manslaughter, a statement, made by the deceased immediately after he was knocked down, as to how the accident happened, has been held admissible; and similar evidence has been received by Lord Holt, in an action brought by a husband and wife against a defendant for wounding the wife.

In all cases of this kind, care must be taken that the *circumstances and declarations* offered in evidence are so *connected with the main fact* under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. See the very recent case of *Harris v. Dignum*, 29 L. J. Ex., 23.

Conspiracy.—The same principles apply to the *acts and declarations* of one of a company of *conspirators* in regard to the common design, as affecting his fellows. Here a foundation should first be laid by proof sufficient to establish, *prima facie*, the fact of conspiracy between the parties. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them. (*R. v. Stone*, 6 T. R., 528; *R. v. Esdaile*, 1 Fost. & F., 43). See "*Conspiracy*," *ante*, p. 69.

There are six classes of cases where the rule rejecting hearsay evidence has been relaxed:—(1) Matters of public and general interest. (2) Declarations against interest. (3) Declarations in the course of business. (4) Dying declarations. (5) Matters of pedigree; and (6) of ancient possession.

1. *Matters of public interest*.—In matters of public and general interest, popular reputation or opinion, or the declarations of deceased witnesses, if made before the litigated point has become the subject of controversy, and without reasonable suspicion of undue partiality or collusion, is admissible.

2. *Declarations against interest*.—A declaration by a deceased person who had a competent knowledge of a fact, and no interest to pervert it, and which declaration was against the pecuniary interest of the declarant at the time when it was made, is evidence as to third parties, and is evidence of everything stated in the declaration. Declarations against interest are admissible against third parties, even although the declarant himself received the facts on hearsay. The declarant must be deceased.

3. *Declarations in course of business*.—Declarations made by a person strictly in the course of his trade or professional business, and without any apparent interest to misrepresent the truth, if contemporaneous with the fact, are evidence after his death, against third parties, of the essential subject matter, but not of its surrounding circumstances.

4. *Dying declarations*.—In murder and homicide, the declarations of the deceased concerning the cause and circumstances of his mortal wound,

if made under a sense of impending dissolution, are admissible in evidence for or against a prisoner who is charged with the crime.

The dying declarations of an accomplice are receivable, and also those made in favour of the person deceased. (*R. v. Tinkler*, 1 East., P. C., 354; *R. v. Scarfe*, 1 M. & K., 551).

To render these declarations admissible, it is necessary (1) *That the death of the deceased should be the subject of the charge.* (2) *The circumstances of the death, the subject of the declaration.* (3) *It must appear to have been made at a time when the deceased was in actual danger of death, and under the belief that his death is about to happen shortly.* (4 and lastly) *Death must have ensued.* See *R. v. Reany*, 26 L. J. M. C., 43, and *R. v. Whitworth*, 1 Fost. & F., 382.

It is not necessary that the declarant should have stated that he was speaking under a sense of impending death, provided it satisfactorily appears, in any manner, that the declarations were really made under that sanction.

Admissions—Confessions.—Admissions and confessions are usually considered as exceptions to the rule excluding hearsay evidence; they are admitted as being against interest, and therefore probably true.

The term *admission* is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent; the term *confession* being generally restricted to *acknowledgments of guilt*.

On the subject of confessions, it is thought sufficient to refer to the recent enactment:—"No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any untrue representation, or by any threat or promise whatever; and any confession made after any such representation, or threat, or promise, shall be deemed to be induced thereby, unless the contrary be shown." (22 Vic., No. 7, s. 11). See a decision on this section, *ante*, p. 69, "Confession."

Evidence excluded on grounds of Public Policy.—1. "No husband shall be competent or compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be competent or compellable to disclose any communication made to her by her husband during the marriage." (22 Vic., No. 7, s. 4).

The protection is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all* communications, of whatever nature, which pass between husband and wife. (*O'Connor v. Majoribanks*, 4 M. & Gr., 435). See 22 Vic., No. 7, s. 4.

2. Where a *Barrister, Solicitor, or Attorney*, is professionally employed by a client, all communications which pass between them in the course, and for the purpose, of that employment, are so far privileged that the legal adviser cannot be permitted to disclose them, whether they be in the form of title-deeds, wills, or documents, &c., delivered, or statements made to him, or of letters, entries, or statements written or made by him, in that capacity. (*Greenough v. Gaskill*, 1 M. & K., 101).

3. Another class of cases in which this rule applies, comprises *Secrets of State*, or matters the disclosure of which would be prejudicial to the public interest.

4. Lastly, the law excludes, on public grounds, evidence which is

indecent, or offensive to public morals, or injurious to the feelings of third persons,—the parties themselves having no interest in the matter, except what they have impertinently created. The mere indecency of disclosures, of course, does not suffice to exclude them where the evidence is necessary for the purpose of justice.

V. DIRECT EVIDENCE, WITNESSES.

Witnesses].—The presiding Magistrate will, upon the motion of either party, order all the witnesses, on both sides, to withdraw, excepting the one under examination, in order that they may be examined out of the hearing of each other; but medical or other professional witnesses are generally permitted to remain in court.

Competency of Witnesses].—Persons who have not the use of reason, (idiots, lunatics), are, from their infirmity, utterly incapable of giving evidence, and are incompetent witnesses.

No person is a competent witness unless he believe in a Supreme Being, who will punish him, either in the present or future life, for perjury.

By 3 & 4 W. IV., c. 49, adopted by 8 W. IV., No. 2., Quakers and Moravians are permitted to make an affirmation in all cases, instead of an oath.

Husband and Wife.—16 Vic., No. 14, s. 2, enacts that, on any inquiry "arising in any suit, action, or other proceeding in any Court of Justice, or before any person having, by law, or consent of parties, authority to hear, receive, and examine evidence, *the parties* (A) thereto, and the persons in whose behalf any such suit, action, or other proceeding, may be brought or defended, shall (except as hereinafter excepted) be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any (B) of the *parties* to the said suit, action or other proceeding;" but s. 3 provides "that nothing herein contained shall render any person, who, in any *criminal* proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall" (see s. 3 of 22 Vic., No. 7) "render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any *criminal* proceeding, or in any proceeding instituted in consequence of adultery;" and, by s. 4 of the latter Act, neither husband or wife is competent or compellable to disclose any communication made by either of them to the other during the marriage. The statutes, (16 Vic., No. 14, & 22 Vic., No. 7), treat the proceedings in all summary convictions, like indictable offences, as "proceedings" which are criminal, (as distinguished from an

(A) By the amending Act, 22 Vic., No. 7, s. 2, "*the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit,*" &c., are competent and compellable, &c.

(B) If it be desired to have the evidence of one party for the other, he must be summoned or subpoenaed in the usual way, like another witness.

action or suit, in which all parties are competent); (c) and as in such cases the *Crown* is the real prosecutor, and the informers or persons preferring the charge are nominal prosecutors, they are not, therefore, *parties* to the proceeding, but "persons in whose behalf such proceedings are brought" within the 2nd section; consequently their wives or husbands are not excluded by the 3rd s. of 16 Vic., No. 14, or by s. 3 of 22 Vic., No. 7, (which sections appear only to disqualify the husband or wife of the party charged), from giving evidence therein, when summoned or examined on their behalf; but, it would seem that they cannot be called by the defendant. (D) In all other cases before Justices, such as proceedings relative to orders for payment of money, or otherwise, (a distinction made by Jervis's Act 11 & 12 Vic., c. 43, s. 1), the complainant and the defendant are "*parties*" to the proceeding in all cases before Justices. The 3rd section of 16 Vic., No. 14, excepts only indictable offences and summary convictions from the operation of the 2nd section; and it therefore follows, that all other proceedings before Justices, such as sureties of the peace, recovery of wages, bastardy cases, &c., are within the latter section, which allows any party to the proceeding, or any other person, to give evidence for either party thereto. The 3rd sect. of 16 Vic., No. 14, & 22 Vic., No. 7, (excepting husbands and wives from giving evidence for or against each other in any criminal proceedings), also do not interfere with, or exclude, the testimony of the husband or wife in cases of personal injury committed by one upon the other, or in cases of high treason, where their evidence was previously admissible, (Arch. Cr. Pl., pp. 227, 228), but leave the law in that respect as it stood before, for the statute is to extend the competency of witnesses, and not to diminish such. Practically, therefore, the operation and effect of the statutes, 16 Vic. No. 14, and 22 Vic. No. 7, may be thus

(c) The words "criminal proceeding" over-ride both the exceptions, viz., any indictable offence, and any offence punishable on summary conviction, (*Attorney-General v. Radloff*, 10 Exch., 94). The learned Editor of the last edition of Paley, (p. 92), says: "It is submitted that every proceeding before a Magistrate, where he has power to *commit*, in contradistinction to his power of making an order, is a criminal proceeding, whether the Magistrate be authorized, in the first instance, to direct payment of a sum of money as a penalty, or at once to adjudge the defendant to be imprisoned."

It is because a man and his wife are sometimes both of them *parties* to the same information, or other criminal proceeding, that the clause prohibiting them, under such circumstances, from testifying for or against each other, is retained in this Act; were it not for such a clause, a wife, conjointly indicted with her husband for murder, might be called by the prosecutor to establish the man's guilt, or the man might be examined by the counsel for the defence, to prove the woman's innocence.

It would hardly seem necessary to add, that the wife of a *prosecutor* in any such proceeding is not excluded from giving evidence either for the Crown or for the defendant, (Taylor Ev., 1060), were it not for the following extraordinary decision of the Parramatta Bench, which occurred but a few months ago: The wife of a man who had been most brutally assaulted, was called to give evidence, corroborating that of her husband, as to what had happened. The Magistrates were persuaded by the attorney for the defence that, under this clause, the wife was incompetent to give evidence for the husband, and dismissed the case, alleging that they did so because the husband's evidence was unsupported.

(D) See the last edition of *Oke's Synopsis*, (1859); *sed quære*.

shown in the two classes of proceedings, with this general exception in *all* cases, and with respect to *all* persons, whether the proceeding be in its nature criminal or otherwise, that nothing in the Act contained "shall render any person *compellable* to answer any question tending to *criminate* (e) himself or herself," (s. 3); but he is *competent* to do so, and may therefore answer such a question if he chooses.

1st. As to Indictable Offences, and Offences Punishable on Summary Conviction.

1. The informer or prosecutor is competent and compellable to give evidence for himself or the defendant. (S. 2).

2. The husband or wife of the informer or prosecutor is likewise competent and compellable to give evidence for each other, but not for the defendant, as he or she would, in that case, be giving evidence *against* the other, which is prohibited, except in cases of personal injuries committed by one upon the other. See *supra*, and Note (D).

3. The defendant (the party charged) is not competent or compellable to give evidence for or against himself or herself. (S. 3).

4. Neither the husband nor wife of the defendant can give evidence on either side, except in cases of personal injuries committed by one upon the other, where the evidence of the injured party is admissible against the other as before the Acts.

2ndly. As to Orders for Payment of Money, such as Wages to Servants and Apprentices, Bastardy Cases; also, Sureties to Keep the Peace, &c., and all other proceedings in Special and Petty Sessions, (not being Criminal proceedings, and not excepted in the 3rd Section).

1. The complainant is competent and compellable to give evidence for himself or the defendant. (S. 2).

2. The husband or wife of the complainant is likewise competent and compellable for or against each other.

3. The defendant is competent and compellable for himself or either or any of the parties to the proceedings. (S. 2).

4. The husband and wife of the defendant is likewise competent.

Accomplice].—A prisoner ought not to be convicted upon the evidence

(E) The word "criminate" only protects the party from answering such questions as tend to subject him to some penalty or punishment, and does not apply where the question merely tends to fix a *civil* responsibility on him, (see 46 Geo. III., c. 37), as in the case of an application for an order in bastardy; for although it is an offence to beget a bastard child, and punishable in the Ecclesiastical Court, the prosecution must, by the 27 Geo. III., c. 44, s. 2, have been commenced within 8 cal. m., (from the sexual connection), and therefore the putative father would not, in many cases, be amenable, by lapse of time, to that proceeding; and according to the decision of Tenterden, C. J., in *Roberts v. Allatt*, (M. & M., 194), he is not excused from answering a question on that ground, the time limited for proceeding being past. The objection that the question will tend to degrade a witness is equally untenable. "The doubt only exists where the questions put are not relevant to the matter in issue, but are merely propounded for the purpose of throwing a light on the witness's character; for if the transactions to which the witness is interrogated form part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character." (2 Phil. Ev., 421). See Tayl. Ev., 1136.

of any number of accomplices, if unconfirmed or uncorroborated by ot he testimony, and such confirmation ought to consist in some circumstance affecting the identity of the accused. A guilty man can always relate the facts of the case, but it does not follow that the person accused was connected with the transaction. There is a danger that, when a man is fixed and knows that his own guilt is detected, he should endeavour to purchase impunity by falsely accusing others. (*R. v. Foster*, 7 C. & P., 107). And see *R. v. Sparks*, 1 Fost. & F., 388. But a conviction on such evidence cannot be quashed as bad in law. (*R. v. Stubbs*, 25 L. J. M. C., 6).

Prosecutor].—It has long been held, that a prosecutor in a criminal proceeding is a competent witness against a prisoner, and although there were formerly exceptions to the rule, they have all now been removed by this and other statutes.

Prisoner].—In all indictable crimes or offences punishable on summary conviction, the prisoner cannot be compelled, nor is even competent, to give oral evidence on oath for or against himself, but he still has his right to state his case before the committing Magistrate or to a Jury.

Degrading Questions].—Questions tending to degrade a witness, it seems, may be asked, but he is not bound to answer them; if he choose to answer such questions, his answer is conclusive. In the Criminal Court, Sydney, 1847, the Chief Justice, Sir A. Stephen, intimated that the three Judges had held a consultation with a view of settling the practice of the Court on this subject, and had decided, that the safer and better way would be not to allow such questions to be put; or, if put, not to be pressed upon the witness. (*Suttor's A. M.*, 168).

VI. EXAMINATION AND CROSS-EXAMINATION.

Examination in chief].—The witness, when placed in the box, 1st, May be examined in chief by the party who calls him: 2nd, May be cross-examined by the adverse party: 3rd, Then he may be re-examined by the party who calls him.

On Examination in chief, a witness must not be asked leading questions, i.e., questions suggesting the answer to the witness; or questions in such form that the witness by answering "yes," or "no," shall give the reply and the evidence which the examiner wishes to elicit.

A witness must be asked only questions of fact, which are relevant and pertinent to the issue; and he cannot be asked irrelevant questions, or questions as to his own inferences, or personal opinion of facts.

Cross-Examination].—On cross-examination a witness may be asked leading questions. (*Parkin v. Moore*, 7 C. & P., 408).

The mode of examination is, in truth, regulated by the discretion of the Court, according to the disposition and temper of the witness, the Court frequently permitting an adverse witness to be cross-examined by the party calling him.

On cross-examination, a witness may be asked any question, the answer to which may tend to affect his credit; but he will not, generally, be bound to answer such questions; he may be asked questions which affect his veracity or memory, such as, whether he has ever been convicted of any

crime,—whether he is intimate with or under obligations to the party now calling him,—whether he is not inimical to the opposite party, &c., &c.

General Remarks.—In examining in chief, the object of the party should be, to elicit from the witness all the material facts which he is called to prove, and to take especial care that the witness does not stand down until he has proved the part of the case he is expected to prove. Generally, it is desirable and proper to ask him only such questions as will confine him to the matter in issue, and such as will elicit his own personal and independent account of it. Unless he deviate into hearsay or other inadmissible kinds of evidence, or unless he ramble into utterly irrelevant matter, it is advisable not to interrupt him.

If he be dishonest or hostile, a more stringent style of examination may be adopted.

In criminal cases, especially where the prisoner is undefended, it is the practice, and probably the duty, of the prosecuting party to ask a witness questions which are favorable to the prisoner; for the duty of the prosecutor is to lay all material evidence impartially before the Court, and not to obtain a conviction.

VII. WRITTEN EVIDENCE AND PRESUMPTIONS.

Written Evidence.—Convictions before Magistrates are proved by examined copies, which are made out, on application, by the Clerk of the Bench. In many cases, under particular statutes, copies certified by the proper officer are sufficient evidence.

Orders.—The original order must be produced, if possible, but secondary evidence may be given of it, if it appear that the party whose duty it is to produce it, has been served with notice to produce. (*R. v. J. of Peterborough*, 18 L. J. M. C., 79).

Extrinsic Evidence.—Extrinsic evidence is inadmissible to contradict, vary, add to, or subtract from the term of a written document; but extrinsic oral evidence is admissible to prove that a written contract, not under seal, has been discharged, either before or after breach. A written instrument cannot be released or avoided by evidence of intrinsically inferior nature; *e.g.*, a deed must be released by a deed; but, where a deed is not under seal, and is not subject to any particular statutory regulation, it is parole evidence; and therefore, generally, a written contract can be discharged by oral evidence.

Extrinsic evidence is admissible, in cases of doubt, to explain written evidence; it is admissible to interpret technical words or peculiar terms in the document, unknown to the Court; it is admissible to identify the person or thing mentioned in the instrument, and to place the Court, as near as may be, in the position of parties to it; but no evidence of the intention of the parties to the document is admissible; the Court interprets *quod dixit*, not *quod voluit*.

Presumptive Evidence.—*Onus probandi* lies on party asserting affirmative. *The law presumes innocence*; where the proof of guilt is insufficient, the prisoner must be acquitted. The law presumes, in criminal matters, that every man intends the probable consequences of an act which may be highly injurious. The law presumes that a person acting in a public capacity is duly authorized to do so. (Thus, a due appoint-

ment is presumed where it becomes a question whether a person acting as a public officer was so at the time. (2 Camp., 131 ; 3 *Id.*, 433). The law presumes everything to the disadvantage of a man who withholds evidence. The law presumes in favour of the continuance of life ; where it is proved that the person has not been heard of for seven years, the presumption arises that he is dead ; but this presumption is only in favour of *the fact* of his death ; there is no presumption as to any specific time when the death took place.

A tenant cannot dispute his landlord's title.

Corpus Delicti].—Sir M. Hale lays down two rules most prudent and necessary to be observed : 1. Never to convict a man for stealing the goods of a person unknown, merely because he will not give an account how he came by them, unless an actual felony be proved of the said goods. 2. Never to convict any person of murder or manslaughter till, at least, the body be found dead,—on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

EXCISE.

See "CUSTOMS," (*ante*, p. 79).

EXPLOSIVE MATERIALS.

See "ARSON," (*ante*, p. 20), 1 Vic., c. 85, s. 5, and "GUNPOWDER," (*post*).

EXTORTION.

M. at Com Law. Bail comp.—Extortion by any officer, by colour of his office.

P. Fine or impr., or both. (Arch. Cr. Pl., 644 ; 1 Hawk., c. 68, s. 1. ; 2 Salk., 680).

N.B.—*There are various other such offences, punishable by particular statutes.*

FALSE IMPRISONMENT.

See "ARREST."

M. at Com. Law. Bail comp.—False imprisonment.

P. Fine or impr., or both. (2 Inst., 589 ; Arch. Cr. Pl., 553).

FALSE PRETENCES.

The statutory offence of obtaining goods or money by false pretences depends upon 7 & 8 G. IV., c. 29, s. 53.

Between this offence and larceny the most intelligible distinction is this :—In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it ; in the former case, the owner has such intention, but the money or chattel is obtained from him by fraud. "If," says Parke, B., "a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." (*Powell v. Hoyland*, 6 Ex., 70).

Where, then, a man represents as an existing fact that which is not an existing fact, and so gets the money or chattels of another, that is a false pretence, it being for the Jury to say "whether or not the pretence used were the means of obtaining the property." (2 Russ. Cr., 289 n). An instance of a false pretence within the statute presents itself, where a person goes to a shop and says, "that he is sent by some particular customer for such and such goods," which, upon the faith of what he says, are handed to him; or, where the secretary of a benefit society obtains money from one of its members by representing that a certain amount, exceeding that actually due, is owing by him to the society, (*R. v. Woolley*, 1 Den. C. C., 559); or, where money is obtained by means of a begging letter, setting forth false statements as to the name and circumstances of the accused, (*R. v. Jones*, 1 Den. C. C., 551); or, where A., the accused, falsely represents that he is connected with B., a person of known opulence, and on the faith of such representation, obtains for himself property. (*R. v. Archer*, 1 Dears., 449). All these are false pretences.

So, the fraudulently offering in payment a spurious note, not within the operation of the Statute Law as to forgery, under the pretence that it is a Bank of England note, would be a false pretence within the statute, (*R. v. Coulson*, 1 Den. C. C., 592). If a person passes a bank note for £5, payable on demand, as a good note, and as of the value of £5, knowing that the bank is insolvent, and has stopped payment, and cannot pay the note in full, he may be indicted for obtaining money by false pretences. (*R. v. Evans*, 29 L. J. M. C., 20).

In this case the evidence showed that the bank had paid a dividend, and so, a direction to the Jury that there was evidence that the note *was not of any value*, was held wrong, and the conviction quashed.

So, where prisoner with intent to defraud, falsely pretended that an Irish one-pound note was a five-pound note, and asked for change, and the prosecutrix believed his representation without looking at the note, and gave him change as for a five-pound note, the prisoner's conviction was upheld. (*R. v. Jessop*, 27 L. J. M. C., 70). It is not necessary that the false pretence should be in words: a person going into a shop in academic costume, and ordering goods, when not a member of the University, would be evidence from which the Jury might infer the pretence that he was a member. (*R. v. Barnard*, 7 C. & P., 784).

A knowingly false statement of a supposed bygone or existing fact, made with intent to defraud, and an obtaining money thereby, will support an indictment. (Per Jervis, C. J.; *R. v. Wellman*, 1 Dears., 198). If a tradesman, knowing that a customer owes him nothing whatever, says that he owes him £5, and gets the money, it comes within the statute.

A mere representation as to some *future* fact would not be within the statute, because, in this latter case, the party addressed has an opportunity of exercising his judgment on the probability of its happening, (by Lord Campbell in *R. v. Woolley*, 1 Den. C. C., 563); although a misrepresentation of a matter of fact, *accompanied by a promise*, is within the statute. (*R. v. West*, 27 L. J. M. C., 227). Neither does a mere falsehood, told by way of excuse, although goods be obtained thereby, (*R. v. Wakeling*, Russ. & R., 504); nor a false statement by the party charged, that he will do or means to do a certain act, constitute a false pretence,

(*R. v. Johnston*, 2 Mood. C. C., 254); nor false representations as to the *quality* of articles pawned or sold, if the articles delivered to the pawnbroker or vendee be the same *in specie* as they were alleged to be, though of inferior quality; it is a representation of a matter of opinion more than a matter of fact, (per Erle, J.), (*R. v. Bryan*, 26 L. J. M. C., 84). In the last case, the prisoner induced a pawnbroker to advance him money on some spoons, which he represented as silver-plated spoons, which had as much silver on them as "Elkington's A," (a known class of plated spoon), and that the foundations were of the best material. The spoons were plated with silver, but were, to the prisoner's knowledge, of very inferior quality, and not worth the money advanced upon them.

A false representation, in the nature of exaggerated praise of an article for sale, is not indictable. (*R. v. Goss*, 29 L. J. M. C., 26).

A person cannot be convicted of obtaining a dog by false pretences, since it is not an animal in respect of which larceny could be committed. (*R. v. Robinson*, 28 L. J. M. C., 58). See "Larceny," *post*. A mere fraudulent overcharge in respect of work done, is not indictable. (*R. v. Oates*, 1 Dears., 495). But where a prisoner committed a fraud, on a sale of cheese, by pretending that a sample he had given the prosecutor to taste was part of the cheese offered for sale, whereas it was taken from another cheese of superior quality, and thus obtained money from the prosecutor; proof of this fraud was held sufficient to support an indictment for obtaining money under false pretences. (*R. v. Abbott*, 1 Den. C. C., 273). The substance of the contract was not cheese of any quality, but a part of the very cheese shown by the vendor.

Intent to Defraud.—Even assuming a false pretence can be proved, it must further be shown that the prisoner thereby obtained the chattel or money laid in the indictment *with intent to defraud*, although it is not necessary to allege or prove that the intent was to defraud any particular person, (16 Vic., No. 18, s. 7); nor need it be stated in the indictment that the false pretence was made with the intention of obtaining the money, if it be proved that the prisoner did intend to obtain it, made the false pretence, and did thereby obtain it. (*Hamilton v. R.*, 9 Q. B., 271). The statute contemplates the case of money being obtained *according to the wish and for the advantage*, or, at all events, *to gain some object*, of the party who makes the false pretence, (*R. v. Garrett*, 23 L. J. M. C., 20); that is, the obtaining must be either by the party's desire or intention, or for his benefit.

Where defendant agreed to sell and deliver to the prosecutor a load of coals at so much per cwt.; he delivered coal, to his knowledge, weighing 14 cwt.; he, however, falsely and fraudulently represented that the quantity he had delivered weighed 18 cwt., and thereby obtained the price of 18 cwt. Held, that this offence fell within the statute. (*R. v. Sherwood*, 26 L. J. M. C., 217). But where the prisoner had done certain work, and claimed a certain sum as due in respect of more work than was the fact, which was paid by prosecutor, *although he knew* that the representation was untrue. This was held not to be an obtaining money by false pretences. (*R. v. Mills*, 26 L. J. M. C., 79). Inducing a person by a false pretence to accept a bill of exchange, is not an obtaining a valuable security by a false pretence within the statute; "the money, &c., to be the sub-

ject to this indictment, must be the property of some one other than the prisoner;" (here the prisoner was the drawer of the bill); "there is difficulty in saying that, as against the prisoner, the prosecutor had any property in the document as a security, or even in the paper on which the acceptance was written;" to support the indictment, the document must have been a valuable security while in the hands of the prosecutor. (*R. v. Danger*, 26 L. J. M. C., 185).

The following very recent case shows the importance of accurately describing the pretence in the indictment: J. B. was one of many persons employed, whose wages were paid weekly at a pay-table; on one occasion, when J. B.'s wages were due, the prisoner said to a little boy, "I will give you a penny if you will go and get J. B.'s money;" the boy innocently went to the pay-table, and said to the treasurer, "I am come for J. B.'s money," and J. B.'s wages were given to him; he took the money to the prisoner, who was waiting outside, and who gave the boy the promised penny. Held, that the prisoner could not be convicted on the charge of obtaining the money from the treasurer by falsely pretending to the treasurer that he, the prisoner, had authority from J. B. to receive the money;—or of obtaining it from the treasurer and the boy, by falsely pretending to the boy he had such authority;—or of obtaining it from the boy by the like false pretence to the boy; but that he might have been convicted on a count charging him with obtaining it from the treasurer by falsely pretending to the treasurer that the boy had authority from J. B. to receive the money. (*R. v. Butcher*, 28 L. J. M. C., 14).

Inasmuch as a failure of justice frequently arose from the subtle distinction existing between larceny and fraud, for remedy thereof it was, by 7 & 8 G. IV., c. 29, s. 53, (and see 16 Vic., No. 18, s. 11), provided that if, upon the trial of any person indicted for obtaining money, &c., under false pretences, "it shall be proved that he obtained the property in question in any such manner as to amount to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor."

It may be added that, although the attempting to obtain goods or money by false pretences is a misdemeanor at Common Law, yet, as remarked, in a recent case, (*R. v. Eagleton*, 24 L. J. M. C., 158), the bare intention to do so is not criminal; some act is required to make it so; nor would all acts towards committing the misdemeanor in question be indictable. "Acts remotely tending towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."

M. 7 & 8 G. IV., c. 29, s. 53. (F). Bail disc.—(1) Obtaining from any

(F) Upon an indictment for this offence, the jury may find the prisoner guilty, although the offence, upon the evidence, turn out to be larceny. (7 & 8 Geo. IV., c. 29, s. 53); but if he be indicted for a larceny, the jury cannot find him guilty, if the offence, upon the evidence, turn out to be an obtaining of money or goods by false pretences. By 16 Vic., No. 18, s. 8, it is sufficient in the indictment to allege the act to have been done "with intent to defraud," without alleging the intent to defraud any particular person; but the false pretence must still be stated and proved accordingly. (19 L. J. M. C., 12). On an indictment for obtaining money under false pretences, if it is consistent with the evidence for the prosecution that

person any chattel, money, or valuable security, by false pretences, with intent to cheat or defraud him of the same.

P. Tr. 7 years, or fine or impr., or both; h. l. and s. c.; or (if male) h. l. on roads 5—3 yrs.

M. at Com. Law. Bail disc.—(2) Attempting to obtain same, &c.

P. Fine or impr., or both. (*R. v. Hall*, C. & M., 249; *R. v. Marsh*, 19 L. J. M. C., 12).

(See "Cheats," "Gaming," "Receivers.")

FEES.

4 W. IV., No. 5.—*An Act for appointing the Fees to be taken in the several Courts of Police and Petty Sessions, and by the Clerks of Justices acting singly, in the Colony of New South Wales.*

S. 1. *Clerks to Benches of Magistrates and Magistrates acting singly, may demand certain Fees.*—The Clerks at the several Police Offices and Petty Sessions, and the Clerks of Magistrates acting singly, shall and may demand, receive, and take the several fees specified in Schedule A., for the business and services therein stated, and by them performed; (see *offence 1, infra*): Provided always, that every Justice may, and is required to, administer to any naval or military pensioner the oath or oaths necessary to be made for the receipt of his pension, without any charge being made for the same.

S. 2. *Clerks to Magistrates to keep printed Tables of Fees in a conspicuous place.*—The Chief Clerk in any Police Office, and the Clerk to every Petty Sessions, shall cause true and exact printed copies of the table of such fees as are specified in the said Schedule to be placed, posted up, and kept constantly in a conspicuous part of the room or place where such office and sessions are respectively held. (See *offence 2*).

S. 2. *Clerks to Magistrates acting singly to produce printed Table of Fees on demanding any Fee.*—The Clerk of every Justice acting singly shall produce and show, if required, to the person requiring to see the same, a printed copy of the said Schedule, upon his demanding payment of any fee. (See *offence 3*).

S. 3. *Clerks to make Returns of all Fees received.*—The several Clerks of the several Police Offices and Petty Sessions shall, once in every three months, make a return, in the form in Schedule B, to the Justices of such Police Offices and Courts of Petty Sessions of each district, respectively, of all fees received by them in their offices or places of business, for services done or performed therein; such return to be signed and sworn to

the object of the false pretence was something else than the obtaining of the money, the charge will not be sustainable. (*R. v. Stone*, 1 Fost. & F., 311). The following are recent cases on indictments for false pretences, and in which the principal decisions on the subject are referred to and commented on:—*R. v. Roebuck*, (1 Dears. & Bell's C. C., 24), as to the quality of an article; and *R. v. Burgon*, (*Id.*, 11), and *R. v. Gardner*, (*Id.*, 40), in both of which there were contracts between the parties.

A person indicted for stealing, cannot be convicted of stealing on evidence showing him guilty of embezzlement, though he might, on such evidence, on the same indictment, have been convicted of embezzlement. (*R. v. Gorbett*, 26 L. J. M. C., 47).

by them, and transmitted as the voucher of their several accounts ; and the said Clerks shall forthwith transmit and pay to the Colonial Treasurer for the time being, the full amount of all such fees, to be appropriated and applied to the public uses of the said Colony, and in support of the Government thereof.

FEES.—SCHEDULE A.

List of Fees to be taken by the Clerks at Police Offices and Petty Sessions, and by the Clerks of Magistrates acting singly, in New South Wales.

	s.	d.
Summons, copy and serving	2	6
Subpoena, not including more than four names	1	6
Copies to serve, each	0	4
Drawing Affidavit and Information, in cases within the jurisdiction of the Magistrates, not exceeding one folio of 72 words	1	0
For every additional folio	0	8
Swearing the same	1	0
Swearing any other Affidavit,—Affidavits for military and naval pensions excepted	1	0
Warrant to apprehend, in cases not felonious	2	6
Recognizance, and Notices of the nature thereof	5	0
Warrant to detain, under Penal Acts	2	6
Order of a Justice or Justices	1	0
Drawing any other document required in the discharge of the Police duties, not enumerated above, per folio of 72 words	0	8
Copy of proceedings, per folio of 72 words	0	4

FEES.—SCHEDULE B.

Account of all Fees received between the day of 18 ,
and the day of , 18 , by the undersigned, as
Clerk of

Time when.	Parties litigating.	From whom.	On what account.	£	s.	d.

(Signed)

Clerk of

S. 4 W. IV., No. 5, s. 1. [One Justice].—(1) Any Clerk at the several Police Offices and Petty Sessions, or Clerk of Magistrates acting singly, or any person acting as such, under pretence of any matter or thing done, transacted, or performed by such person as clerk, demanding or receiving any other or greater fee than such as are specified and set forth in Schedule A.

P. Fine £5 : (g) to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22. See "Abattoir," *ante*, p. 1, and "Justices, Recovery of Fines," *post*, and *ex parte* Cockburn, *post*, Part III.

S. *Id.*, s. 2. [*One Justice*].—(2) Chief Clerk in every Police Office, or Clerk to every Petty Sessions, failing to cause true and exact printed copies of the Table of specified Fees to be posted up in a conspicuous part of the office or sessions-room. (See s. 2).

P. Fine 10s. for every day on which same shall not be so placed, posted up, or kept; (Note g) : to be recovered as offence (1).

S. *Id.* [*One Justice*].—(3) Clerk of every Justice acting singly neglecting or refusing to produce and show, if required, to the person requiring to see the same, a printed copy of said Schedule, upon his demanding payment of any fee. (See s. 2).

P. Fine 10s.; (Note g) : to be recovered as offence (1).

FENCES (DIVIDING).

For the provisions regulating Dividing Fences, and the recovery of costs incurred in their erection, see 9 G. IV., No. 12.

For stealing or injuring Fences, see "Larceny," "Malicious Injuries."

FELONY AND MISDEMEANOR.

Crimes have, from an early period, been distributed by the law of England into three classes—*Treasons*, *Felonies*, and *Misdemeanors*.

The prominent feature in High Treason is, the violation of the allegiance due from a subject to the Sovereign, as the Supreme Magistrate of the State. Between felonies and misdemeanors, the distinction at the present day is, in great measure, arbitrary and very unsatisfactory, a felony being distinguishable from a misdemeanor rather by the consequences which follow on a conviction for the offence, than by any particular element or ingredient appearing in it.

"Felony" is, in our criminal law, intermediate between treason (which is a higher kind of felony) and misdemeanor; and it is distinguishable from both. The crime of felony is of remote origin, and was founded upon feudal principles. Its incidents were not formerly, as they are now, of a merely arbitrary nature, preremptorily annexed to certain criminal acts. It sprung from the feudal relations. At the present day, a conviction for felony, *ipso facto*, induces a forfeiture of the property—real or personal, or both—of the offender. (Cr. L. Com., 4 Report, p. 12).

The term "misdemeanor" applies to all crimes of an inferior degree, which do not fall within either of the preceding divisions.

Our Criminal Law is *imperative* with reference to the conduct of individuals; so that, if a statute forbids or commands a thing to be done, all acts or omissions contrary to the prohibition or command of the statute are offences at Common Law, and ordinarily indictable as such. As illustrating

(g) Penalty not recoverable if complaint be not made within one calendar month after the commission of the alleged offence. (S. 2).

this rule, see *R. v. Woodrow*, (15 M. & W., 404), where it was held, under a penal statute, (5 & 6 Vic., c. 93, s. 3), that a dealer in tobacco, although ignorant of its adulteration, is liable to the penalties imposed by that Act. (And see *Lee v. Simpson*, 3 C. B., 871; *R. v. Humphreys*, 14 Q. B., 388). The word "*crime*" is popularly understood as conveying the idea of something done in violation of law, and therefore exposing the criminal to some sort of punishment. Under the denomination of crimes are comprised offences of a *public nature*, i.e., all such acts or attempts as tend to the *prejudice of the community*. (5 C. B., 407). "All *misdeemeanors* whatsoever of public evil example against the Common Law may be indicted," says Hawkins, (Bk. 2, c. 25, s. 4); "but no injuries of a private nature, unless they in some way concern the king." Also, he adds—"It seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it."

"I am of opinion," says Lord Denman, in *Buchanan's case*, (8 Q. B., 883), "that wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment; I quite agree, that where, in the clause containing the prohibition, a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued. The case then is as if the statute had simply declared that the party doing the act was liable to the particular punishment; but, where there is a distinct absolute prohibition, the act is indictable."

An indictment will only be for some wrong common to all the subjects of the Crown;—common, in this sense, that it affects them all, not of necessity equally, but in some degree. The distinction of crimes from civil injuries seems principally to consist in this, that the latter "are an infringement or privation of the civil rights which belong to individuals, considered merely as *individuals*;" whilst crimes are "a breach and violation of the public rights and duties due to the whole community, considered as a *community*, in its social aggregate capacity." Murder and robbery are properly ranked amongst crimes, since, besides the injury involved in them to individuals, they strike at the very being of society, which cannot possibly subsist where acts of this sort are suffered to escape with impunity. Many inferior offences, also, of a public nature, are indictable; and a crime will be deemed of a public nature, not merely where it causes some hurt, damage, or inconvenience to the public, but also where it is "of a public evil example." Thus it is an indictable offence for a parent who has the means of supporting her child, (*R. v. Chandler*, 1 Dears., 453), to neglect to provide sufficient food or necessities for it, whilst of very tender years and unable to take care of itself; though, in this case, some injury to the health of the infant must be shown. (*R. v. Philpot*, 1 Dears., 179). It is at Common Law indictable knowingly to take a glandered horse into a market, fair, or other place of public resort, to the danger of the liege subjects of the Crown. (*R. v.*

Henson, 1 DearsL., 24). And any outrage upon public decency, as well as against the public peace, is indictable. (*R. v. Holmes*, 1 DearsL., 207).

FELONS (ABSCONDING).

See "ESCAPE," "PRISONERS."

S. 4 Vic., No. 10, s. 2. (H) [Two Justices].—(1) Any male offender under sentence of transportation, (1) absconding a first time, or absenting

(H) By s. 1, Convicts absconding, and being apprehended before the expiration of their sentences, to serve the time of their absence in addition to the term of their sentence. By s. 21 of 3 W. IV., No. 3, Twenty-four hours' absence from the employment of Government, or from private service, without due leave having been first obtained for such purpose, shall be deemed an absconding; and, by s. 20, Convicts absconding are to serve the time of their absence, and be punished, though their sentences may have expired at the time of such trial; and s. 19 provides a punishment for absconding a second time, &c.; (and see 3 Vic., No. 22, s. 5). S. 18 contains a list of offences by convicts, and their punishments, which are within the summary jurisdiction of Justices in Petty Sessions.

By s. 22 of 3 W. IV., No. 3, Offenders escaping from penal settlements or iron-gangs, &c., are liable, on conviction before two Justices, (*if males*), to be publicly whipped, and to be forthwith transported or sent back to the penal settlement, &c., from which they escaped; (*if females*), to be returned "to the place of confinement from which she escaped, and kept in solitary confinement, on bread and water," for not exc. one cal. m.; and such offenders shall be detained until they have served out the full measure of their sentences, as well as of the time during which they escaped or were absent. By s. 23, Convicts wilfully disabling themselves are to serve the time of their disability; and, by s. 32, Records are to be kept of such offenders' names, and returns thereof transmitted, &c.; and the Clerk of the Peace or Clerk of Petty Sessions is to keep such records under a penalty.

3 Vic., No. 22, abolishes the transportation of female convicts, and provides for a more effectual punishment of female offenders. This Act is modified by 5 Geo. 4, No. 3.

By s. 1 of 18 Vic., No. 7, All laws, ordinances, rules, and regulations in force respecting felons and other offenders transported from the United Kingdom, shall be applied to all felons or other offenders who have been or shall be convicted and sentenced in the said Colony.

1. 2. As often as any felon or other offender convicted in the said Colony shall escape from lawful custody, or abscond from the district or other place to which, or regulations or conditions in that behalf made, he shall be restricted, although the time of his apprehension or trial for such offence, the original term of sentence may have expired, such felon or other offender may, notwithstanding, be at time apprehended, tried, and convicted of such escape or absconding, and be liable to be dealt with in all respects as persons escaping or absconding from any subsisting sentence are or may be liable to. See, *ante*, "Escape."

Evidence of being a Transported Convict].—By 3 W. IV., No. 3, s. 35, it is provided that, as often as any question shall arise in any Court in the Colony, whether any person is or hath been a transported felon or offender, the indent, or instrument in writing commonly called an indent, purporting to contain the name, name, and sentence or order of transportation of any such person to New South Wales or its dependencies, or an examined copy of so much thereof as may be necessary for the occasion, shall,—upon the production thereof before such Court, together with due proof that such indent or instrument in writing hath been signed and kept in the office of the Colonial Secretary for the said Colony, or in the proper office for such purpose, as an authentic instrument, and that such person or person named therein arrived in the said Colony or its dependencies as a transported felon or offender, and was reputed to be and dealt with as the person named in such indent or instrument in writing,—be received and admitted as evidence in such Court of every such person as aforesaid, touching whom

himself from the service of his master or employer for any period exceeding one week.

P. Labour in irons 12—3 mths., or for the term such offender shall have been absent; or punishment authorized by 3 W. IV., No. 3, s. 22. (Note H)

S. *Id.*, s. 3. [*Two Justices*].—(2) Any transported male offender absconding from the employment of Government, or from the service of his master or mistress, a second time, or oftener.

P. Labour in irons, not exc. 2 yrs., nor less than 3 cal. m., or for the time of such offender's absence.

S. *Id.*, s. 8. [*One Justice*].—(3) Any settler, householder, or other free person, harbouring in or about his house, lands, or otherwise,—or in any way employing any convict illegally at large.

P. Fine £50—£1: to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22. See, *post*, "Justices, Recovery of Fines," where s. 1 of 5 W. IV., No. 22, is given at length; and *ex parte* Cockburn, *post*, Part III.

N.B.—*If defendant prove to Justice's satisfaction that he used diligence in ascertaining, and had reasonable ground for believing, that such convict was free, it shall not be imperative on Justice to impose any penalty.* (S. 8).

S. 3 W. IV, No. 3, s. 25. [*Two Justices*].—(4) Any person harbouring or concealing any transported felon or offender who may be illegally at large, or seducing or exciting any such person to abscond from the employment of Government, or the service of his master or mistress.

P. Fine £10—£5, and a severer punishment if the offender be a convict under sentence of transportation; if fine adjudged, to be recovered as offence (3).

M. 4 Vic., No. 10, s. 5.—Any convict who may have escaped from the Colony being found at large anywhere beyond the limits of the same, or within any of H. M. possessions in the islands of New Zealand.

P. Tr. to a penal settlement 14 yrs., on being convicted before any Court of General Quarter Sessions.

FELONS (INFANTS).

It is sufficient, in this place, to refer to the "Act to provide for the Care and Education of Infants, under the age of nineteen years who may

such question shall arise, being or having been a transported felon or offender for the term or time in such indent mentioned; and as often as any such question shall arise, whether any person shall have been transported to Van Diemen's Land or its dependencies, then the production of the order of removal, or written document, under and by virtue of which such person shall have been removed or sent from Van Diemen's Land or its dependencies to New South Wales or its dependencies, or an examined copy of so much thereof as may be necessary, together with due proof that such written order or document hath been kept in the proper office for such purpose, and that such person arrived in New South Wales or its dependencies as a transported felon or offender, and was reputed to be and dealt with as the person described in such written order or document, shall be in like manner received and admitted as sufficient evidence of such person having been transported to Van Diemen's Land or its dependencies for the term or time in such written order or document mentioned.

be convicted of Felony or Misdemeanor," (13 Vic., No. 21). By s. 1, Such infant may be assigned by the Supreme Court, or any Judge thereof, upon the application of any person willing to take charge of such infant, and to provide for his or her maintenance and education, if such Court or Judge shall find that the same will be for the infant's benefit, due regard being had to the infant's age, the prevention of crime, &c.

FINES.

Appropriation of Fines].—2 Vic., No. 23, s. 1, enacts, That whenever any law or statute that is or shall be in force within the Realm of England, and which shall be in other respects applicable to the Colony of New South Wales, shall direct the appropriation of any forfeiture, penalty, or sum of money, or any part thereof, for the use or on behalf of the poor of any parish, township, or other place, the same shall be and is hereby required to be paid, at the discretion of the Justice, Judge, or Court imposing the fine or penalty, to the Treasurer or other authorized officer of any benevolent or charitable society, established or to be established in any district of the Colony, for the relief of such poor persons as, through age, accident, or infirmity, are unable to support themselves: Provided that in any district in which there is no benevolent or charitable society, the same shall be paid towards the support of the Benevolent Society in the City of Sydney.

And by s. 1 of 11 Vic., No. 29, it is provided,—That whenever any law or statute that is or shall be in force within the Realm of England, and which shall be in other respects applicable to the said Colony, or which shall have been or shall be adopted in the said Colony, shall direct the appropriation of any fine, forfeiture, penalty, or sum of money, or any part thereof, to be paid to the overseers of the poor, for the use of County or other rates, or to any person or persons, or for any purpose or purposes inapplicable to the state or circumstances of the said Colony, the same shall be and is hereby required to be paid, at the discretion of the Justice, Judge, or Court, imposing the fine, forfeiture, or penalty, to the Treasurer or other authorized officer of any benevolent or charitable institution established, or to be established, in any district of the said Colony, for the relief of such poor persons as through age, accident, or infirmity, are unable to support themselves: Provided that in any district, except as hereinafter provided, in which there is no such benevolent or charitable institution, the same shall be paid towards the support of the Benevolent Asylum of Sydney; and by s. 2, the Governor may remit the whole or any part of such fines, &c.

11 Vic., No. 43, s. 1, repeals the clauses of 9 Vic., No. 8, (An Act regulating the sale and delivery of Coal in Sydney, &c.), and 9 Vic., No. 15, (The Customs Act), respecting the appropriation of fines, &c. By s. 2, All fines, &c., under the above-mentioned Acts shall be paid,—one moiety to H.M., and the other moiety to the Informer, who shall be entitled also to his costs or charges, to be ascertained, &c., by the Justices hearing the case.

Drunkenness, Fines of].—By 17 Vic., No. 6, s. 5, All fines and penalties paid and recovered by virtue of the Licensed Publicans Act, from

persons convicted of drunkenness, shall be paid to the Treasurer or other authorized officer of any Benevolent Asylum, &c., established or to be established nearest to the Court of Petty Sessions where the case shall be heard, for the relief of such poor persons as, through age, sickness, accident, or other infirmity, are unable to support themselves; and, by s. 4, Any constable suing for a penalty under ss. 66, 67, and 68 of the Publicans Act shall be entitled to half the penalty.

Police Fund].—16 Vic., No. 33, s. 22. All fines imposed on any Chief or other Constable under this Act, (Police Regulation Act), and all penalties or portions of penalties and damages awarded to any member of the Police Force, by any Justice of the Peace on any summary conviction, as the prosecutor of any information, or otherwise, shall be paid to the Colonial Treasurer, to be by him applied and set apart towards a fund to be called the Police Reward Fund, &c.

16 Vic., No. 1, s. 15. Whenever any fine, penalty, or forfeiture shall be imposed or authorized to be imposed by any Act of Council, such Act shall be taken to provide that the same, when recovered, shall be paid, one moiety to Her Majesty, her Heirs and Successors, for the public uses of this Colony and in support of the Government thereof, and that the same shall be applied in such manner as may be directed by the Legislature, &c.; and that the other moiety thereof shall be paid to the informer, or person prosecuting or suing for the same, unless the Act imposing the fine, &c., shall otherwise direct. By s. 16, Any fine, &c., may be sued and proceeded for by any person whomsoever, unless by the Act imposing the same such right to sue, &c., shall be expressly given to any officer or person by name or designation.

By 19 Vic., No. 14, s. 7, (Police Act), Where, by any Act now in force or hereafter to be passed, a moiety or other fixed portion of the penalty or penalties thereby imposed is, or shall be, directed to be paid to the Informer, not being a party aggrieved, it shall be lawful for any of Her Majesty's Justices of the Peace, before whom the conviction shall be had, to adjudge that no part, or such part only of the penalty as he shall think fit, shall be paid to the Informer.

FIRE.

See "MALICIOUS INJURIES."

If in Sydney, see 8 W. IV., No. 6. (The Building Act).

S. 14 G. III., c. 78, s. 84. [*Two Justices*].—Any menial or other servant, through negligence or carelessness, firing or causing to be fired any dwelling-house, or out-house, or other buildings.

P. Fine not exc. £100, (to the churchwardens, &c., of the parish where the fire shall happen, to be distributed to the sufferers by such fire); in default of immediate payment, impr. for 18 mths., with h. l.

N.B.—*Appeal allowed.* (S. 96).

FIRE-WORKS.

S. 9 & 10 W. III., c. 7, s. 2. [*One Justice*].—*Two witnesses.*
(1) Any person making or causing to be made, or selling, giving, or

uttering or offering, or exposing to sale, any squibs, rockets, serpents, or other fire-works, or any cases, moulds, or other implements for the making of any such squibs, &c.

P. Fine £5: to be recovered by distress; in default, impr. not exc. 3 cal. m., unless sooner paid. (11 & 12 Vic., c. 43, s. 22).

S. *Id.* [One Justice].—Two witnesses. (2) Any person permitting or suffering any squibs, &c., (as in No. 1), to be cast, thrown, or fired from, or out of, or in his house, shop, dwelling, lodging, or habitation, or from, &c., any part thereof, or place thereto belonging or adjoining, into any public street, highway, road, or passage, or any other house or place whatsoever.

P. Fine 20s.: recoverable as offence (1).

S. *Id.*, s. 3. [One Justice].—Two witnesses. (3) Any person throwing, casting, or firing, or aiding or assisting in the throwing, &c., of any squibs, &c., (as in No. 1), in or into any public street, house, shop, river, highway, road, or passage.

P. Fine 20s.; in default, impr. for not exc. 1 mth., with h. l., unless sooner paid. (*Id.*, s. 3).

FIRE-ARMS.

The Fire-arms Act (16 Vic., No. 27) expired on the 31st of December, 1859, and has not been revived.

FORCIBLE ENTRY.

See "ENTRY."

FORGERY.

Forgery is the fraudulent making or alteration of a writing or seal to the prejudice of another man's right. The instrument forged must so far resemble the true instrument as to be capable of deceiving persons of ordinary observation, (*R. v. Collicott*, R. & R., 212); any material alteration, however slight, is a forgery, as well as an entire fabrication. The fraudulent application of a false signature to a true instrument, or a real signature to a false one, are forgeries; and if the name forged be merely a fictitious one, it is as much forgery, if done for the purpose of fraud, as if the name was that of a real person. (4 Steph. Com., 213). Forgery is misdemeanor at Common Law, but by statute is felony.

Where a party receives a blank cheque signed, with directions to fill it up in a certain amount, and he fills it in a different amount, and retains the proceeds of the cheque, he is guilty of forgery, although he believes that the amount so filled in is due to himself. (*R. v. Wilson*, 2 C. & K., 527). A forgery must be of some document or writing; therefore the painting an artist's name on the corner of a picture, in order to pass it off as an original, is not forgery. (*R. v. Gloss*, 3 Jur. N. S., 1309).

A pawnbroker's duplicate of goods pledged is an "accountable receipt of goods" within 1 W. IV., c. 66, s. 10. (*R. v. Fitchie*, 1 Dears. & B., C. C. R., 175).

Where the prisoner, with a view of getting the situation of police con-

stable, forged and uttered to the Chief Constable, who had the power of appointment to the situation, letters containing a false account of himself, and recommending himself as a person of upright character, he was held to be guilty of forgery at Common Law. (*R. v. Moah*, 27 L. J. M. C., 204).

Evidence].—In a prosecution for forging and uttering a receipt, knowing it to be forged, it was proposed to give in evidence other acts of forgery by the prisoner against the same prosecutor, as evidence of guilty knowledge, on the count for receiving. It was objected that they could only be given in evidence if they were forgeries, and there was no evidence of that, without first asking the jury to find them so, which was not the issue they had to try. It was held by Byles, J., after consulting Martin, B., that the whole evidence must be confined to the document they were proceeding upon, without at all trenching upon the rule as to uttering in other cases. (*R. v. Moore*, 1 Fost. & F., 73).

F. 4 W. IV., No. 4., s. 2. Bail disc.—(1) Knowingly and wilfully inserting, or causing or permitting to be inserted, in any register of any baptisms, marriages, or burials, kept by any officiating minister, any false entry of any matter relating to any baptism, &c., or forging or altering in any such register, any entry relating to any baptism, &c., or uttering any writing as and for a copy of any entry in such register of any matter relating to any baptism, &c., knowing such writing to be false, forged, or altered; or uttering any entry in any such register, of any matter relating to any baptism, &c., knowing such entry to be false, &c.; or wilfully destroying, defacing, or injuring, or causing or permitting to be destroyed, &c., any such register, or any part thereof; or forging or altering, or uttering, knowing the same to be forged, &c., any license of marriage. (κ)

P. Tr. life—7 yrs., or impr. 4—2 yrs.; or (*if male*) h. l. on roads 15—5 yrs.; (*if female*), impr. 7—2 yrs., h. l. and s. c.

F. Id., s. 4. Bail disc.—(2) Knowingly and wilfully inserting or causing to be inserted in any copy of register, (directed to be transmitted to Registrar of Archdeacon's Court), any false entry of any matter relating to any baptism, &c.; or forging or altering, or uttering, knowing the same to be forged or altered, any copy of any register so directed to be transmitted; or knowingly and wilfully signing or verifying any copy of any register so directed to be transmitted, which copy shall be false, knowing the same to be false.

P. Tr. 7 yrs., or impr. 2—1 yr.; or (*if male*) h. l. on roads 5—3 yrs.; (*if female*), impr. 3—1 yr., h. l. and s. c.

F. Id., s. 6. Bail disc.—(3) Falsely making, forging, or counterfeiting, or uttering, publishing, or making use of, knowing the same to be falsely

(κ) By 16 Vic., No. 18, ss. 5, 6, 7, It is sufficient in an indictment for forging, uttering, engraving, &c., any instrument, plate, &c., to describe such instrument, &c., "by any name or designation by which the same may be usually known," without setting out any fac-simile or copy thereof; and by s. 8, The indictment need not allege an intent to defraud any particular person. It is sufficient to lay the intent generally to defraud, and the prisoner may be convicted, although it does not appear that he had any intention ultimately to defraud the party whose signature he had forged, he having defrauded the party to whom he uttered the instrument. (*R. v. Trenfield*, 1 Fost. & F., 43).

made, forged, or counterfeited, the Great Seal of the Colony, or any document or writing bearing, or purporting to bear, the signature of the Governor, or of the Colonial Secretary, or of any of H. M. Principal or Under Secretaries of State for the Colonies, or of any of H. M. Commissioners of Customs, with intent to defraud any person whatever; or of the Principal Superintendent of Convicts, (s. 7), with intent to aid the escape, &c., of any convict.

P. Tr. 14—7 yrs.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr. 5—2 yrs., h. or l. l. and s. c.

F. 1 W. IV., c. 66, ss. 3 & 4. *Bail disc.*—(4) *Private Securities*.]—Forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, or any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent to defraud any person. (See 4 W. IV., No. 4, s. 5).

P. Tr. life—7 yrs.; or impr. 4—2 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 15—5 yrs. (9 Vic., No. 3).

F. 1 W. IV., c. 66, s. 10. *Bail disc.*—(5) Forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for the payment of money, with intent to defraud any person.

P. Tr. life—7 yrs.; or impr. 4—2 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 15—5 yrs.

F. 1 W. IV., c. 66, s. 12. *Bail disc.*—(6) Without lawful excuse, (the proof to be upon the party accused), to purchase or receive from any other person, or have in his custody or possession, (see s. 28 for rule as to criminal possession), any forged bank-note, bank bill of exchange, or bank post bill, or blank bank-note, &c., knowing the same to be forged.

P. Tr. 14 yrs.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr. 5—2 yrs., h. or l. l. & s. c.

F. *Id.*, s. 17. *Bail disc.*—(7) *Banker's Notes*.]—Make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate, or company, carrying on the business of bankers, (other than the Bank of England), appearing visible in the substance of the paper, without authority, (the proof of which to be on accused); or without lawful excuse, (proof of which to be on accused), knowingly have in his custody or possession any such frame, &c.; or, without such authority, manufacture, use, sell, expose to sale, utter or dispose of; or, without lawful excuse, knowingly have in his custody or possession any paper in the substance of which the name or firm of any such bankers shall appear visible; or, without such authority, cause the name or firm of any such bankers to appear visible in the substance of the paper upon which the same shall be written or printed.

P. Tr. 14—7 yrs.; or impr. 3—1 yr., h. l. and s. c.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr., with h. or l. l., 5—3 yrs.

F. Id., s. 18. *Bail disc.*—(8) Engraving on plate, &c., any bill of exchange or promissory note of any bankers, or using such plate, or uttering or having any paper upon which part of such bill or note is printed.

P. The same.

F. 1 W. IV., c. 66, s. 19. *Foreign Instruments*].—(9) Engraving plates, &c., for foreign bills or notes, using or having such plates;—or uttering paper on which any part of such bill or note is printed.

P. Tr. 14—7 yrs.; or impr. 3—1 yr., h. l. and s. c.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr., with h. or l. l., 5—2 yrs.

F. 7 & 8 G. IV., c. 28, s. 4; 14 *Vic.*, No. 1; 13 *Vic.*, No. 16; and 16 *Vic.*, No. 14. *Official Documents*].—(10) Of official documents, decrees, orders, private Acts, &c.

P. See various statutes.

(*There are numerous other forgeries of a local nature, or applicable to particular departments of Government, provided for by statute, which are either misdemeanors or felonies, for which see under the particular titles*).

M. at Com Law. Bail comp.—(11) Forgery at Common Law not provided for by statute.

P. Fine or impr., or both. (See 2 East, P.C., 859; *R. v. Boulton*, 2 C. & K., 604).

F. 1 W. IV., c. 66, s. 25. *Bail disc.*—(12) Accessories after the fact, under 1 W. IV., c. 66.

P. Impr. not exc. 2 yrs., h. l. & s. c.

The following is a list of the most important Colonial statutes on this subject:—

14 *Vic.*, No. 1.—Forging Stamps of United Kingdom.

16 *Vic.*, No. 22.—Extending provisions of 14 *Vic.*, No. 1.

16 *Vic.*, No. 14.—Of Certified Copies, or Extracts; of Stamps, Seals, &c., under that Act, (The Law of Evidence Act).

11 *Vic.*, No. 56.—Defrauding Joint Stock Company.

13 *Vic.*, No. 16, s. 5.—Of Judicial or Official Seal Signatures, &c.

13 *Vic.*, No. 36, s. 17.—Of Hawker's License.

13 *Vic.*, No. 37, s. 14.—Of Pawnbroker's License.

Id., s. 20.—Of Pawnbroker's Duplicate.

6 *G. IV.*, No. 22, s. 6.—Of Memorial, &c., of Deed, &c.

FRIENDLY SOCIETIES.

See 17 *Vic.*, No. 26; 14 *Vic.*, No. 11; 11 *Vic.*, No. 10; 11 *Vic.*, No. 53; and 7 *Vic.*, No. 10.

GAMING. (κ)

See "LOTTERIES," "VAGRANT."

S. 14 Vic., No. 9, s. 1. (L) (M) [*Two Justices*].—(1) The owner or keeper of any gaming-house, or other person having the care and manage-

(κ) See the important colonial decisions on this Act, *post*, Part III., *R. v. Butterworth*, *R. v. Cullen & others*, and *R. v. Dixon*.

(1) Sec. 1 authorizes the Justice to issue a special warrant, of which a Form is

ment thereof, and also every banker, croupier, or other person acting in any manner in conducting any common gaming house, room, premises, or place. (Summary or indictable).

P. Fine not exc. £100; or, at discretion, impr., with or without h. l., for not exc. 6 cal. m. If fine adjudged be not paid, to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure 5 W. IV., No. 22, (s. 10 of 14 Vic., No. 9). See "Justices, Recovery of Fines," *post*, where s. 1 of 5 W. IV., No. 22, is given at length.

N.B.—*Upon conviction, all moneys and securities for money seized, as aforesaid, (Note L) shall be forfeited.* (S. 1).

S. *Id.*, s. 1. [*Two Justices*].—(2) Any person being found in such house, room, premises, or place, without lawful excuse.

P. Fine not exc. £5: to be recovered as offence (1). (N) See *R. v. Cullen & others*, *post*, Part III.

S. *Id.*, s. 10. [*Two Justices*].—(3) Any person in any respect offending against this Act, or any provision therein, (where no other penalty in that behalf is by this Act specifically imposed).

P. Fine not exc. £20: to be recovered as offence (1).

For offences of this kind under the Publican's Act, (s. 36), see, *post*, "Publican."

M. at Com. Law. Bail comp.—(1) Keeping a common gaming-house.

P. Fine or impr., or both.

given, (see Forms, *post*, Part III.), on complaint, on oath, that there is reason to suspect any house, room, premises, or place to be kept or used as a common gaming-house, to enter such house, and to arrest all such (*sic*!) persons found therein, and to seize all tables and instruments of gaming, moneys, &c., found therein, to be dealt with according to law; and, by s. 4, Justices may order all such tables and instruments of gaming to be destroyed.

(M) Sec. 2 defines what shall be deemed to be a common gaming-house, by enacting that "In default of other evidence in proving any house or place to be a common gaming-house, it shall be sufficient to prove that a house, room, premises, or place is kept or used for playing at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played are not alike favourable to all players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet;" and, by s. 3, It is not necessary to prove that any person found playing at any game was playing for money, wager, or stakes; and further, by s. 4, that, "Where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game, shall be found in any house, &c., suspected to be used as a common gaming-house, and entered under a warrant, &c., or about the person of any of those who shall be found therein, it shall be evidence, until the contrary be made to appear, that such house, &c., is used as a common gaming-house." By s. 5, Persons required to be examined as witnesses, and making a full discovery, are to be freed from all penalties and prosecutions to which they may be liable for such unlawful gaming.

Constables are empowered to visit houses, &c., where any public table or board is kept for playing at billiards, bagatelle, bowis, fives, racket, quoits, skittles, or nine-pins, or any game of the like kind, when and so often as such constable shall think proper. (S. 6).

(N) *Appeal, Procedure*.—An appeal is allowed by s. 10, according to procedure of 5 W. IV., No. 22; (see "Appeal"); and the same section enables the proceedings to be by summons, without information.

M. 14 Vic., No. 9, s. 7. (o) Bail disc.—(2) Any person, by any fraud or unlawful device, or ill practice, in playing at or with cards, dice, table, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, past-time, or exercise, winning from any other person to himself or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money, &c., under a false pretence.

P. Tr. 7 yrs.; or fine, or impr. with h. l. & s. c., or both, (7 & 8 G. IV., c. 29, s. 53); or h. l. on roads 5—3 yrs. (*if male*). (See "False Pretences.")

GAOL.

See "ESCAPE," "LOCK-UP."

S. 4 Vic., No. 29, s. 8. One Justice.—(1) Any gaoler, turnkey, or other person employed in any gaol, prison, or house of correction, refusing admittance to, or offering any hindrance or obstruction to, any Justice when entering and examining any gaol, &c.

P. Fine £10: (P) (q) to be levied by distress; in default of distress, impr. not exc. 6 mths. (S. 18 of 4 Vic., No. 29; and ss. 19 & 22 of 11 & 12 Vic., c. 43).

S. Id., s. 11. (r) One Justice.—(2) Any person carrying, bringing,

(o) In any indictment under s. 7, it is not necessary to state to whom the money belonged; and, *quere*, whether, in order to constitute an offence under the statute, it is necessary that any money should be actually obtained. (*R. v. Moss*, 26 L. J. M. C.) It may be added that, under s. 8, a foot-race is within the proviso, (*Batty v. Marriott*, 5 C. B., 818); but sweeps on horse-races are still illegal, as lotteries. (*Gatty v. Field*, 9 Q. B., 431). By betting on horse-races or other matters no penalty is incurred; and see *Varney v. Hickman*, 5 C. B., 271; and 24 L. J. Ex., 174.

(P) *Recovery of Penalties*.—By s. 18, All fines, forfeitures, and penalties imposed by this Act, or by any rule made in pursuance thereof, shall be levied by distress and sale of the offender's goods and chattels, by warrant of the convicting Justice or Justices; and for want of sufficient distress, such offender shall be committed to gaol for any term, not exc. 6 cal. m.

(q) *Appeal*.—By s. 20, Any person aggrieved by any conviction, may appeal to the Quarter Sessions within 4 cal. m. after the cause thereof shall have arisen, on giving at least ten clear days' notice, in writing, to the convicting Justices and the Clerk of the Peace, and, within two days after such notice, entering into recognizances before some Justice of the district, with two sufficient sureties, conditioned to try such appeal, and abide the order of, and pay such costs as awarded by, the Court.

(R) *Power of Visiting Justice, &c.*—By s. 12, The visiting Justice shall have power to hear and determine all complaints touching any of the following offences, that is to say:—Disobedience of the rules of the prison; assaults by one person confined in such gaol upon another, where no dangerous wound or bruise is given; profane cursing and swearing, any indecent behaviour, and any irreverent behaviour at or during divine service or prayer, all which are hereby declared to be offences under this Act, if committed by any description of prisoners whatsoever, confined within any such gaol, prison, or house of correction; and the said visiting Magistrate shall also hear and determine all complaints of idleness or negligence in work, or wilful mismanagement of work; which are also hereby declared to be offences under this Act, if committed by any prisoner under conviction for any crime; and if the party complained of shall be convicted of any of

or attempting or endeavouring to carry or bring, into any prison to which the provisions of this Act shall extend, any spirituous or fermented liquor.

P. Impr. for not exc. 3 mths., without bail or mainprize, unless offender immediately pay not exc. £20, nor less than £10, (11 & 12 Vic., c. 43, s. 23); or, (if a convict, under unexpired term of transportation), h. l., in irons, on public works, for not exc. 2 yrs.

F. Id., s. 14. Bail disc.—Any person conveying, or causing to be conveyed, into any prison or house of correction, any mask, visor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoner, and the same delivering or causing to be delivered to any prisoner, or other person for the use of such prisoner, without the consent and privity of the keeper of such prison, &c.; or any person, by any means whatsoever, aiding and assisting any prisoner to escape from any prison, &c.

P. Tr., not exc. 14 yrs.; or (*if male*) h. l. on reads 10—5 yrs.; (*if female*), impr. 5—3 yrs., h. or l. l. and s. c.

Gaols, their Management, &c.—(4 Vic., No. 29).—By s. 1, All the buildings and enclosures now used and supported by Government as public gaols, prisons, and houses of correction, shall continue to be such. By s. 2, The Governor may, by proclamation, appoint places to be used as public gaols, &c. By s. 3, The Sheriff of New South Wales shall have control of all gaols, &c., and custody of all prisoners confined therein, and shall appoint keepers, &c., subject to the approval of the Governor;—the House of Correction at Carter's Barracks, Sydney, and such other houses of correction detached from any gaol or prison, or separated therefrom by a substantial wall, as the Governor may think fit, being exempted from the Sheriff's control, and being under the exclusive control of visiting Justices. By s. 4, The Judges of the Supreme Court are empowered to order imprisonment of offenders in any gaol or house of correction. By s. 5, All gaols, &c., shall be governed by regulations made by the Governor: Provided that all rules and regulations for the management of debtors' prisons shall be made by the Judges of the Supreme Court of New South Wales. By s. 6, Gaols shall be also houses of correction and debtors' prisons, unless otherwise appointed. By s. 7, The Governor may appoint visiting Justices; and every visiting Justice so appointed shall be required to visit such gaol, prison, or house of correction, at least once

the offences aforesaid, it shall be lawful for the said visiting Justice to sentence such party to be confined in a solitary cell, on bread and water, for any term not exceeding seven days.

Repeated Offences.—8. 13. In case any prisoner under sentence for any crime shall be guilty of repeated offences against the rules of the prison, or of any greater offence than hereinbefore mentioned, upon complaint thereof to two or more Justices of the Peace, of whom the visiting Justice may, or may not, be one, such Justices shall have power, upon oath, to inquire into and to determine the matter of such complaint, and to order the offender, on conviction, to be punished by close confinement, for any term not exceeding one calendar month, or by personal correction, in case of prisoners convicted of felony, or sentenced to hard labour.

in every week, unless prevented by illness or other sufficient cause, and shall from time to time make such reports to the Colonial Secretary as may be required by order of the said Governor; and every Justice may, as often as he may think fit, enter and examine any gaol, prison, or house of correction. (S. 8). By s. 9, The Sheriff or visiting Justice may order all persons sentenced to imprisonment without hard labour, to be set to some labour not severe, except such prisoners as maintain themselves: Provided that no prisoner who has the means of maintaining himself shall have any claim to be supplied at the public expense.

Separate Confinement].—By s. 10, To prevent contamination, the Sheriff or visiting Justice may order any prisoner to be separately confined during the whole or any part of his (or her) imprisonment,—such not to be deemed solitary confinement within the meaning of any Act forbidding the continuance of solitary confinement for more than a limited time: Provided that no cell shall be used for the separate confinement of any prisoner, unless of such a size, and so ventilated and lighted, that he (or she) may be confined therein without injury to health; and every prisoner so confined shall be allowed such air and exercise as shall be deemed necessary by the surgeon.

Removal of Prisoners].—By s. 15, Whenever it shall appear to the Governor that it is necessary that the confinees in any public gaol, prison, or house of correction, should be removed therefrom, in order that the same may be repaired, improved, enlarged, or rebuilt, or on account of any contagious or infectious disease therein, or of the over-crowded state of such gaol, &c., or for any of the purposes of this Act; and due notice thereof, in writing, shall, by the Governor's order, be given to the Sheriff, such Sheriff may remove such confinees, or any of them, to such other gaol, prison, house of correction, or other place of confinement within his jurisdiction as the said Governor shall appoint and consign them to during the time such gaol, &c., shall be repairing, &c.; and when such gaol, &c., shall be made fit for the reception, &c., of such confinees, the Sheriff may remove back thereto such prisoners as shall then be in his custody; and also, upon the proclamation of any newly-erected gaol, &c., the Sheriff may remove all prisoners in his custody in such place, &c., to such gaol, &c., according to their respective sentences. And see "Prisoners."

Removal on account of Disease or other Emergency].—S. 16. Whenever any contagious disease or other emergency shall render necessary the immediate removal of the confinees from any gaol, &c., and it shall be, previously, impossible to obtain the Governor's order, the visiting Justice or Police Magistrate of the district shall issue an order to the keeper to remove such confinees, or any of them, to such other prison as specified in such order: Provided that such removal shall be so restricted in duration as required in similar removals by the Governor's order; and every such order of the visiting Justice or Police Magistrate, with the causes thereof, shall be notified to the Governor and the Sheriff: Provided, further, that no such removal shall be deemed to be an escape, and nothing herein shall discharge the Sheriff or other officer from being answerable for any prisoner's escape. By s. 17, The Sheriff, or his deputy, may remove any prisoner from any gaol to any other gaol, being also under his control, or, in case of illness, to any hospital or infirmary, as occasion shall require, after obtaining leave on application to a Judge of the Supreme Court.

GAOL RULES.

I.—In all cases where the building will allow of separate classification, the prisoners are to be divided into three classes :—

1. Debtors and others confined for contempt on civil processes.
2. Prisoners committed on charges of felony or misdemeanor, or for want of sureties, and prisoners convicted of misdemeanors.
3. Prisoners convicted of felony.

FEMALE WARDS.

II.—There shall be separate wards for females, in which the foregoing classification shall be observed as far as possible; and in every prison where there are female wards, there shall be a Matron, and such other female officer as may be necessary.

III.—In the gaols where there are female wards, there shall be separate keys for such wards, and neither the keeper of the gaol nor any of his male turnkeys or other officers, shall go into such wards, except in company with the Matron.

INFIRMARY.

IV.—A convenient and suitable apartment within the gaol shall be set apart and appropriated as an Infirmary, for the reception of sick and diseased prisoners; and a separate one for females.

CLEANLINESS.

V.—The walls, ceilings, passages, and cells of every prison, used by the prisoners, shall be lime-washed at least once in each and every year, and oftener if requisite; and all the wards, cells, and passages used by the prisoners shall be daily swept, cleansed, and ventilated; and all filth or rubbish removed to the place appropriated for the deposit of it.

HEALTH.

VI.—All prisoners confined within any prison shall be allowed as much air and exercise as may be deemed proper (consistently with their safe custody) for the preservation of health; and for such purpose, places shall be allotted for the different classes respectively, as circumstances will permit.

NO MONEY TO BE GIVEN.

VII.—No money or other valuable consideration, under the name of garnish, or under any other name, shall be taken from any prisoner on his or her entrance into or departure from prison, or for his or her accommodation in the prison, or for the use of any furniture or utensils, or under any other pretence whatever.

ADMISSION OF FOOD AND CLOTHING FOR CERTAIN DESCRIPTION OF PRISONERS.

VIII.—Prisoners confined for debt, or committed for trial, shall be allowed to procure for themselves, and to receive at proper hours, any food, bedding, clothing, or other necessities, subject to a strict examina-

tion by the keeper of the said prison, in order to prevent extravagance and improper indulgence within the said prison, or the admission of fermented or spirituous liquors, or other prohibited articles; and all articles of clothing and bedding shall be examined, in order that it may be ascertained that such articles are not likely to communicate infection or facilitate escape.

NO GAMING TO BE ALLOWED.

IX.—No gaming shall be permitted in any prison, and the keeper shall seize and destroy all dice, cards, or other instruments of gaming.

WINE OR TOBACCO NOT TO BE ADMITTED.

X.—No wine or tobacco shall be admitted into any prison, except by written order of the Surgeon, recorded in his journal. No spirituous liquors shall be admitted within the outer walls of a prison on any pretence whatever.

VISITORS.

XI.—The keeper of the gaol shall admit, at proper times and seasons, and under proper restrictions, to be regulated by the visiting Justice, persons with whom debtors or prisoners committed for trial may be desirous of communicating.

XII.—Visitors to debtors shall be admitted to their wards or rooms from ten o'clock in the morning till four o'clock in the afternoon, and not at any other time, without a special order from the visiting Justice, or other person authorized to give such order by No. XXVIII. of these Regulations; and on Sundays, Christmas Day, and Good Friday, the time shall be limited to two hours in the morning, and two hours in the evening.

XIII.—If any visitors shall refuse to go out of the prison when required so to do, or shall misbehave or act improperly towards the keeper or other officer of the prison, the keeper may compel them to go out, and refuse them admittance in future, till the facts shall be inquired into by the visiting Justice, who shall have power to continue or take off such denial of admittance.

DIVINE SERVICE.

XIV.—All prisoners confined shall attend divine service as often as thereunto required by the Chaplains appointed to attend the said gaol.

RELIGIOUS CONSOLATION.

XV.—Prisoners may, at all proper times and seasons, receive spiritual consolation according to the faith they shall profess, and as they shall desire to have administered to them by the ministers of their religion.

DEATHS TO BE REPORTED.

XVI.—Upon the death of any prisoner within any gaol, notice thereof in writing shall forthwith be given by the keeper thereof to the visiting Justice, and to the Coroner of the district; also, to the nearest relative of the deceased, where practicable.

PRISONERS UNDER SENTENCE OF DEATH.

XVII.—Prisoners condemned to suffer death shall remain in the condemned cells until the sentence be executed, or commuted. Their friends shall have access to them at all seasonable times; their diet shall be the prison allowance only, and they shall be allowed to walk a short time every day, under sufficient guard, in the yard attached to their cells.

PRISONERS' CLOTHING.

XVIII.—Every person committed to the gaol shall, on his admission, be searched, and all money or valuable property that may be found on him shall be taken possession of by the Gaoler, and an account of it be entered by the Gaoler in his journal. The Surgeon shall also examine every prisoner who shall be brought into prison before he or she shall be passed into the proper ward; and no prisoner shall be discharged from prison if labouring under any acute or dangerous distemper, nor until (in the opinion of the Surgeon) such discharge is safe, unless such prisoner shall require to be discharged. The wearing apparel of every prisoner shall be fumigated and purified, if requisite, after which the same shall be returned to him or her; or in case of the insufficiency of such clothing, then other sufficient clothing shall be furnished; but no prisoner, before trial, shall be compelled to wear a prison dress, unless his or her overclothes be deemed insufficient or improper, or necessary to be preserved for the purpose of justice; and no prisoner, who has not been convicted of felony, shall be liable to be clothed in a party-coloured dress; but, if it be deemed expedient to have a prison-dress for prisoners not convicted of felony, the same shall be plain. All prisoners shall have their hair cut in a proper manner, but not so as to disfigure them.

SURGEON TO KEEP A JOURNAL.

XIX.—The Surgeon of every gaol shall keep a journal, and in it he shall enter, day by day, and in the English language, an account of the state of each sick prisoner, the name of his or her disease, a description of the diet and medicine, and any other treatment he may order for such prisoner.

GAOLER TO KEEP A JOURNAL.

XX.—Every Gaoler shall keep a journal, in which he shall record all punishments inflicted by his authority, or by that of the visiting Justice, and the cause thereof, and the day when such punishment shall have taken place, and all other occurrences of importance within the said gaol; and such other books, inventories, &c., as shall be required of him, particularly an inventory of all fixtures and furniture in the gaol, an account of all the expenses incurred for the gaol, the number of persons daily rationed in it, and an account of all moneys or other articles received for the use of the prisoners, or taken from prisoners on their entrance into the gaol.

GAOLER TO VISIT THE WARDS AND CELLS DAILY.

XXI.—The keeper of every prison shall visit and inspect every ward

and cell in it, once at least every twenty-four hours; or, if he fail to do so, he shall state the cause of his omission in his journal.

USE OF IRONS.

XXII.—No prisoner shall be kept in irons by any Gaoler except in cases of urgent and absolute necessity, and the particulars of every such case shall be forthwith entered in the keeper's journal, and notice forthwith given to the visiting Justice; and the keeper shall not continue the use of irons on any prisoner longer than forty-eight hours, without an order in writing from the visiting Justice, specifying the cause thereof, which order shall be preserved by the keeper as his warrant for the same.

DEMEANOR OF THE GAOLER.

XXIII.—The keeper of every gaol shall exercise his powers with temper, and without favour, partiality, or personal resentment; he must not strike a prisoner or use provoking language, and shall require and enforce humanity and good temper towards the prisoners from the turnkeys and subordinate officers.

TURNKEYS.

XXIV.—The turnkeys or subordinate officers of every gaol shall never be absent without leave from the Gaoler or visiting Magistrate; they shall not strike any prisoner, nor use any provoking language; they shall obey all orders given to them by the Gaoler; they shall bring nothing into the gaol without his knowledge and permission; they shall neither give nor sell anything to any prisoner, nor shall they convey to or from a prisoner anything whatsoever without the knowledge of the Gaoler.

TIME FOR LOCKING-UP AND UNLOCKING.

XXV.—The time for locking-up and unlocking, also for giving air and exercise to the prisoners, will be regulated in each gaol by the Gaoler, with the approbation of the visiting Magistrate.

CUSTODY OF PRISONERS.

XXVI.—The custody of the prisoners will be vested in the Sheriff, and the Gaoler, who is the officer of the Sheriff, will be held responsible for the same; but the Gaoler will, at each visit of the visiting Magistrate, report to him all irregularities which may have occurred since his last visit; and he will report, in writing, to the visiting Justice, any irregularity of a serious nature immediately on its occurrence, as well as any sickness, accident, or other extraordinary event that may happen in the gaol. The Gaoler will also communicate to the visiting Justice all the orders that he may receive from the Sheriff.

GAOLER TO KEEP A RECORD OF THE VISITS OF VISITING MAGISTRATE, SURGEON, AND CHAPLAIN.

XXVII.—A book shall be kept by the Gaoler, in which every visit of the visiting Magistrate, Surgeon, Chaplain, and any other officers of the gaol not resident in it, shall be entered by the individual himself; also, the visits of the Magistrates and of strangers,

SPECIAL ORDER NECESSARY FOR LEAVE TO VISIT ANY GAOL.

XXVIII.—No persons, except Magistrates of the Colony, can be allowed to visit any gaol without an order, either from the Governor, Colonial Secretary, the Sheriff, or visiting Justice; Magistrates of the Colony may, however, personally introduce visitors without any such order.

NEITHER GAOLER NOR MATRON TO SLEEP OUT OF THE GAOL.

XXIX.—No keeper of a gaol, nor matron thereof, shall sleep out of it, without permission from the visiting Magistrate.

PERSONS NOT BELONGING TO THE GAOL NOT TO SLEEP IN IT.

XXX.—No Gaoler shall permit any person who does not belong to the prison, to sleep within the walls of it, without permission from the visiting Magistrate.

XXXI.—No Gaoler shall keep, or permit to be kept, within the walls of any prison, either dogs, poultry, pigs, pigeons, rabbits, or goats, or any other animal which can be in any way injurious to the cleanliness and good order of the establishment.

XXXII.—Requisitions for the service of the gaol will be made by the Gaoler, and transmitted through the Sheriff to the proper department of Government; every such requisition must be submitted by the Gaoler to the visiting Magistrate, and no requisition will be attended to that is not recommended by him.

INSTRUCTIONS TO VISITING MAGISTRATES.

1. The visiting Justice of each gaol will take care that a copy of the Act of Council, 4 Vic., No. 29, be kept in the gaol; that sections 5, (with the exception of the latter part of it), 7, 8, 9, 10, 11, 12, 13, and 14 of the same Act be hung up in two or more conspicuous places within the same; as also the Regulations which may, under the authority of the 5th section of the Act, be made by the Governor with the advice of the Executive Council.

2. The principal duty of the visiting Magistrate being, to see that all these Regulations are duly enforced, he will, for that purpose, in addition to the weekly visits which are required of him by the Act of Council, visit the gaols at such uncertain times as may to him appear necessary.

3. He will, on the first of every month, make a report in writing to the Colonial Secretary, in which he will specify the general state of the gaols, and how far the Regulations have been attended to, and the business of the gaol properly conducted; and he will accompany his report with a return of all punishments inflicted by his own order, or by that of the Gaoler.

4. He will also report to the Colonial Secretary any occurrence of an extraordinary nature at the time of its happening, or anything that may seem to him proper to be brought under the immediate notice of the Government.

5. All requisitions made by the Gaoler will be submitted to him before they are forwarded by the Gaoler to the Sheriff, as well as all applications

which either directly or indirectly may lead to any expenditure of public money. No requisition or application of this nature will be attended to that is not recommended by the visiting Magistrate, and the visiting Magistrate will consequently be held strictly responsible that he recommends nothing that can reasonably be dispensed with.

6. He will report whenever repairs are required, and, if possible, the probable expense of them.

7. He will be particular in carrying into effect the ninth clause of the Act of Council, which authorizes the employment of the prisoners at any work they may be enabled to perform.

8. The visiting Justice will not have power to release any person from confinement, or to order his or her discharge from the gaol; but it will be one of his most important duties to satisfy himself at every visit that no persons are improperly or unnecessarily confined to gaol; and he will bring every such case or supposed case immediately before the Government.

9. He will particularly take care that prisoners of the Crown are not allowed to remain in gaol by the negligence of any department of Government, or by the mistake of any officer; and, if prisoners of the Crown are ever committed to gaol, there to await the decision of the Governor or Principal Superintendent of Convicts, he will instantly report the fact of their being in the gaol to the Colonial Secretary, and he will continue his reports weekly, until such persons shall be removed.

10. He will equally take care that persons sentenced to transportation or iron-gangs be not detained longer than may be absolutely necessary in gaol; and, as great inconvenience has heretofore been incurred from the improper detention of persons in prison, his attention is most particularly drawn to this portion of his duties.

GOLD-FIELDS.

S. 20 Vic., No. 29, s. 8. (s) [One Justice].—(1) Any person, not being the holder of the Miner's Right, or a lease under this Act, mining for gold upon any proclaimed gold-field,—or any person employing any such unauthorized person so to mine,—or any person, not being the holder of a Miner's Right, license, or lease, duly empowering him in that behalf, and not being an authorized person within the meaning of this Act, occupying any waste lands in, or becoming resident upon or at, any proclaimed gold-field.

P. (1st offence), not exc. £5; (2nd or subsequent offence), not exc. £10, and not less than £5: to be recovered either by distress, (11 & 12 Vic., c. 43, s. 19), or according to the procedure of 5 W. IV., No. 22. See ex parte Cockburn, Part III.

S. Id., s. 9. [One Justice].—(2) Any person mining, or employing any person to mine, for gold in any land belonging to a private individual, without the consent of the owner thereof, or his duly authorized agent. (τ)

(s) *Appeal*.—Appeal allowed to the next and nearest Quarter Sessions, when penalty amounts to £10 and upwards. (8. 34).

(τ) By s. 11, The Governor may appoint officers to determine the extent and posi-

P. Fine same as offence (1) : to be recovered as offence (1).

S. 20 Vic., No. 29, s. 18. (v) [*One Justice*].—(3) Any person holding the Miner's Right, or a lease issued under the provisions of this Act, having been duly summoned, (s. 14; Note T), and disobeying such summons, and failing to attend at the time and place named therein, or to be sworn as an assessor, unless some reasonable cause for non-attendance or refusal of such person be made to appear.

P. Fine not exc. £5 : recoverable as offence (1).

S. *Id.*, s. 19. [*Two Justices*].—(4) Any person assaulting or resisting any officer, (s. 11), or Justice of the Peace, or any of the assessors, or any person duly authorized by him or them, whilst in the execution of duties to be performed under this Act ;—or any person, after the hearing and determining of any complaint, and having had the boundaries of his claim pointed out by any officer or Justice, again encroaching or trespassing as aforesaid.

P. Fine not exc. £25, or, at discretion, impr. with h. l. not exc. 3 mths. : fine recoverable as offence (1).

M. 20 Vic., No. 29, s. 29. *Bail comp.*—(1) Any person forging any Miner's Right, license, or lease, issued or purporting to be issued under the authority of this Act ; or fraudulently using, uttering, or exhibiting any such forged Miner's Right, license, or lease, knowing the same to be

tion of the claim to which each person is entitled under a Miner's Right, license, or lease, and to mark such extent. By s. 13, Any Justice, upon complaint of any holder of a Miner's Right, or any license or lease, that any other person has encroached upon the complainant's claim, is to proceed forthwith to the spot, and, on his own view, or upon the oath of any witness, to determine the same in a summary way ; and if it shall appear to such Justice that the person complained against has so encroached, by occupying, mining, or undermining such claim, or in any other way whatsoever, or that the person complaining has so encroached upon the claim of the person complained against, such Justice may cause the person so found to have encroached as aforesaid, his servants, implements, goods, and chattels, to be removed from the claim so encroached upon.

By s. 14, Such complainant, or person complained of, or such Justice, previous to the hearing, may require that two persons, holding Miners' Rights, shall assist such Justice, as assessors, who, being sworn, shall determine such complaint, and whether any gold has been removed, and whether any damage has been sustained ; and the decision of a majority, consisting of such Justice and one assessor, shall be binding. By s. 15, Such Justice and assessors as aforesaid, or any two Justices, may cause the re-delivery of any gold removed from any claim, and cause damages, not exceeding £100, to be paid by the person proved to have encroached, to the party encroached upon : to be recovered by distress and sale of the goods and chattels of such person, as in other penalties ;—no imprisonment in default of payment of such damages to exceed three months. By s. 16, If assessors do not attend, Justice may adjourn ; in case the required number of assessors do not attend the adjourned meeting, after due summons, such Justice may proceed to hear and decide, with one such assessor, if one shall be in attendance, or without any assessor, if none be present ;—during the adjournment the working of the claim to be suspended. By s. 17, A fee of one guinea may be demanded by the Justice of the complainant,—and, if not paid, the Justice may refuse to attend to the complaint ; and this fee shall be refunded by the defendant if the case goes against him.

A penalty is inflicted for non-attendance, &c., as assessors, (s. 18) ; see offence (3) ; and assessors are entitled to a fee of 10s.

(v) SS. 20—31 provide for the constitution of the Local Court.

forged; or any person fraudulently personating the holder of any such Miner's Right, license, or lease, or falsely and fraudulently representing that any servant or other person is an authorized person within the meaning of this Act; or fraudulently using or exhibiting as his own any Miner's Right, license, or lease, belonging or granted to any other person; or using or exhibiting as a valid Miner's Right, license, or lease, any Miner's Right, license, or lease, which shall have expired.

P. Fine or impr., with or without h. l., or both.

M. Id., s. 30. Bail comp.—(2) Any holder of any Miner's Right, license, or lease, issued under the provisions of this Act, by any fraudulent device or contrivance, defrauding or attempting to defraud Her Majesty, or any person authorized to receive the same, of any money or gold payable or reserved by such Miner's Right, license, or lease; or concealing or making any false statement as to the amount of any gold procured by him; or falsifying any accounts with a fraudulent intent.

P. Fine or impr., with or without h. l., or both.

M. Id., s. 30. Bail comp.—(3) Any officer or servant of such holder, or any other person whatsoever, knowingly being concerned in such fraud or attempted fraud, whether with or without the knowledge or concurrence of such holder.

P. The same.

GUNPOWDER.

See 23 Vic., No. 6.

M. 18 Vic., No. 21, s. 1. Bail comp.—Any person shipping or causing to be shipped on board of, or delivering or causing to be delivered from, any vessel in any port or place in the Colony, any gunpowder or other explosive material, or vitriol or other such mineral acid, without a special notification thereof to the Collector or other principal officer of the Customs at or nearest to such port or place, or without a plain and durable brand or superscription on the package containing the same, showing that gunpowder or some other, and what, explosive material, or vitriol or other such mineral acid, as aforesaid, is therein contained, and also showing the quantity thereof;

or,

Any person in charge of any vessel, knowingly receiving on board, or permitting to be landed, any gunpowder or other explosive material, or vitriol or other mineral acid, as aforesaid, without such notification and brand or superscription.

P. Fine or impr., at the discretion of the Court.

HABEAS CORPUS.

The Writ of Habeas Corpus is one of the most important remedies which a Court of Common Law can be called on to provide; it is adapted to effect the great object enunciated in *Magna Charta*, that no man "shall be taken or imprisoned unless by lawful judgment of his peers, or by the law of the land."

The evasions of this Common Law right by Charles I. gave rise to the statute 31 Car. 2, c. 2.

It enacts, 1st. That, on complaint and request *in writing*, by and on behalf of any person committed and charged with any crime, (unless committed for treason or felony, expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any (murder or) felony; or upon suspicion of such, plainly expressed in the warrant; or unless he have been convicted or charged in execution by legal process), any of the Judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall, unless the party has neglected for two terms to apply to any Court for his enlargement, award a *Habeas Corpus* for such prisoner, returnable immediately before himself or any other of the Judges; and, upon the return made, shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper Court of judicature.

2nd. That such writs shall be endorsed as granted in pursuance of this Act, and signed by the person awarding them.

3rd. That the writ shall be returned and the prisoner brought up within a limited time, according to the distance, not exceeding, in any case, twenty days.

4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority specified in the Act, shall, for the first offence, forfeit £100, and for the second offence, £200, to the party aggrieved, and be disabled to hold their office.

5th. That no person, once delivered by *Habeas Corpus*, shall be re-committed for the same offence, on penalty of £500.

6th. That every person committed for treason or felony shall, if he require it, the first week of the next term, or the first day of the next session of Oyer and Terminer, be indicted in that term or session, or else be admitted to bail, unless the King's witnesses cannot be produced at that time; and, if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from imprisonment for such imputed offence.

This is the substance of this great and important statute, which, it may be observed, extends to the case of commitments for such criminal charges as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *Habeas Corpus* at Common Law. But even on suits at Common Law, it is now expected by the Court, agreeably to ancient precedent and the spirit of the Act of Parliament, that the writ should be immediately obeyed; otherwise an attachment will issue.

As the statute 31 Car. 2, c. 2, "extends only to cases of commitment or detainer for *criminal* or supposed criminal matters," it was thought proper, in the year 1816, to extend its remedies to all other miscellaneous causes of confinement. Accordingly, by statute 56 G. III., c. 100, entitled, "An Act for more effectually securing the liberty of the subject," it was enacted, that when any person shall be confined, or restrained of his or her liberty, (otherwise than for some criminal or supposed criminal matter), any one of the Judges may, in vacation time, award the writ, if upon

affidavit, or affirmation (in cases where, by law, an affirmation is allowed), probable and reasonable ground for it shall appear. The writ is to be returnable immediately before the Judge who awards it, or any other Judge of the same Court; or, if issued so late in the vacation as to make it not conveniently returnable in the same vacation, it may then be made returnable in Court on a certain day in the next term.

Although the return upon the face of it be good and sufficient, the truth of it may be questioned, and the facts examined on affidavit or affirmation.

The Courts may award this writ also in term time, returnable, if convenient, in the next vacation, before any Judge of the respective Court; and in all these cases, disobedience to the writ may be punished as contempt of Court.

It may be observed that the writ of *Hab. Corp. ad subjiciendum*, to which the above statutes mainly refer, and to which we are now confining our attention, is one only,—though by far the most important,—of a large class of writs of Habeas Corpus. The object being, as already indicated, to effect deliverance from illegal confinement, it commands the party detaining the prisoner to produce his body, with the true statement of the time of his caption and the cause of his detention. (*Ex parte Child*, 15 C. B., 238). The writ is granted on motion out of any one of the Supreme Courts of Common Law, wherever probable and sufficient ground has been assigned for the interposition of its authority, (*Hobhouse's Case*, 3 B. & Ald., 420; *Ex parte Bradbury*, 14 C. B., 15), and lies to any part of the Queen's dominions; for the Sovereign, it has been said, ought to have account why any of her subjects are imprisoned.

The rule for a Habeas Corpus is sometimes made absolute in the first instance. The return to the writ is made by producing the prisoner, and setting forth the grounds and proceedings upon which he is in custody. If the return is deemed to present sufficient matter in justification of the prisoner's detention, he is remanded to his former custody; if insufficient, he is discharged therefrom. (*R. v. Douglas*, 3 Q. B., 625; *Hammond's Case*, 9 Q. B., 92). The return cannot be traversed, (Corner Cr. Off. Pr., 116), nor need it be verified by affidavit, (Per Jervis, C. J., in *re Hake-well*, 12 C. B., 228); but its validity is determined upon argument on the day of return, though sometimes new matter is allowed to be introduced to guide the discretion of the Court. (*R. v. Eglington*, 2 E. & B., 707). A writ of Habeas Corpus will indeed sometimes be quashed, on the ground of irregularity or fraud, but not for matter that could have been properly returned to it. (*Carus Wilson's Case*, 7 Q. B., 984). A warrant of commitment being bad, a second warrant was allowed to be substituted for it as the return to a Habeas Corpus. (*Ex parte Smith*, 27 L. J. M. C., 186).

HARBOUR AND PILOTAGE.

22 Vic., No. 4; 14 Vic., No. 37; 14 Vic., No. 15; 11 Vic., No. 15; 9 Vic., No. 13; 13 Vic., No. 30; 16 Vic., No. 8; 7 Vic., No. 12; 7 Vic., No. 9; 6 Vic., No. 10; 4 Vic., No. 4; 7 W. IV., No. 2; 5 W. IV., No. 7; 3 W. IV., No. 6; and 6 G. IV., No. 10.

HARD LABOUR.

See "ESCAPE," "FELONS ABSCONDING," "LOCK-UP," "PRISONER."

15 Vic., No. 5, s. 1, enacts, That when any male offender shall hereafter be convicted in any Court of competent jurisdiction in New South Wales, or before any Justice or Justices of the Peace, of any offence now or hereafter punishable by law with imprisonment in any gaol or house of correction, with hard labour, it shall be lawful for such Court, Justice, or Justices, at discretion, either to sentence such offender to imprisonment in any gaol or house of correction, with hard labour, for such term as by law in that behalf provided, or, in lieu thereof, to award and direct that he be kept to hard labour on the roads or other public works of the Colony, for such term as the said Court, Justice, or Justices shall think fit, not being more in any case than the term of imprisonment fixed by law for such offence.

By s. 2, It shall be lawful for the Governor to keep any male offender who shall have been sentenced as aforesaid, during the term of his sentence, or any part or parts thereof, as circumstances may render expedient and proper, and as His Excellency shall think fit, to hard labour at any place or places which shall have been duly appointed as a place or places at which male offenders under sentence of transportation, or under sentence to hard labour on the roads or other public works in lieu of transportation, shall be detained, or in any gaol or house of correction in the said Colony. And see 17 Vic., No. 15, and, *post*, "Prisoner."

HAWKERS (LICENSED).

S. 13 Vic., No. 36, s. 2. [*One Justice*].—(1) Any person, without having first obtained a license, carrying on the business of a hawker or pedlar in any place within the Colony. (v) (w)

(v) Licenses are to be issued on the second Tuesday in March, June, September, and December. Notice, in writing, of the intended application for such license to be sent to the Clerk of Petty Sessions of such police district on or before the third Tuesday in the month previous; certificates of good character from at least two known and respectable inhabitants of the district to be produced to Justices assembled to issue licenses; the applicant to enter into a recognizance before Justices, or any two of them, with two approved sureties, each in £20. For Forms of License, Notice, and Recognizance, see the Schedule to the Act. Fee for personal license is £1,—for license to hawk with vehicles, £2,—for the year, or such smaller sum as may be proportioned to the time the same shall be in force. No license is of any force until the fee is paid. Licenses continue in force till December 31st; they are only available in the police district for which they are granted. (S. 11). Any constable may seize and detain any unlicensed person carrying on the business of a hawker. (S. 13).

16 Vic., No. 4, s. 1, excludes Books, printed Pamphlets, Periodicals, or other printed Publications, from the provisions of the above Act. (13 Vic., No. 36).

(w) *Definition of Hawker*.—The selling or offering for sale goods carried about on the person, or on any animal, or in any conveyance, whether by land or water, in any city, town, street, road, or place within the Colony, is carrying on business as a hawker. (S. 23). The Act does not extend to selling any printed newspapers, any fish, fruit, water, fuel, milk, vegetables, or victuals of any kind, or agricultural produce, or to the selling of any goods by the maker thereof, or his children or servants residing with him, in any city, town, street, road, or place, or at any sale at any duly established market or fair, or in any house or shop occupied by the person selling, &c.

P. Fine not exc. £20 : to be recovered by distress ; in default of distress, impr. not exc. 14 days where penalty is not more than £5 ; and not exc. 3 cal. m. where penalty is of greater amount. (13 Vic., No. 36, s. 25 ; 11 & 12 Vic., c. 43, ss. 19 & 22). The former procedure is given in Note (x).

N.B.—*Any person carrying on such business shall be deemed to be unlicensed, unless he shall prove to the contrary by the production of his license, or otherwise.* (S. 2).

S. *Id.*, s. 14. [*Two Justices*].—(2) Person licensed not having his pack, bag, dray, &c., marked conspicuously with the words "Licensed Hawker," together with his name in full length, and the number of his license, and also the name or names of the police districts for which he is licensed.

P. Fine not exc. £10 : to be recovered as offence (1). With regard to witnesses, see Note (y).

S. *Id.*, s. 15. [*Two Justices*].—(3) Persons not licensed writing, painting, or printing, or causing to be written, &c., or keeping or continuing written, &c., upon packs, &c., the words "Licensed Hawker," or any other words to such effect.

P. Fine not exc. £10 : to be recovered as offence (1).

S. *Id.*, s. 16. [*Two Justices*].—(4) Any licensed hawker or pedlar neglecting or refusing to produce and show license to any Justice or constable, or to any person to whom within 24 hours previously he shall have

(x) *Procedure, Recovery of Fines, &c.*—No conviction shall take place unless within three calendar months after the commission of the offence complained of. (S. 25). The information to be in writing ; but proceedings by summons may be had without a formal information being exhibited, provided that in every such summons the nature of the complaint be succinctly stated. Appeal is allowed. (s. 28) : see "Appeal," p. 7. It has been thought advisable to give the mode of recovery of penalties, and their distribution, prescribed by this section, (s. 25), although, as far as the provisions of Jervis's Act can be applied, they ought to be followed. See ss. 19 & 22 of 11 & 12 Vic., c. 43. On non-payment of penalty and costs, distress warrant to issue at any time not more than fourteen days from date of conviction, returnable on some day to be inserted in the warrant, not being more than fourteen days from the date thereof, authorizing a levy for fine and costs, and 5s. for such distress ; "and the goods forthwith to seize and carry to the nearest Police Office ; and the goods so seized shall be sold at 12 o'clock on the third day after the same shall have been carried to the Police Office, unless the full amount of the penalty and costs be sooner paid ; and the surplus, if any shall remain after the payment of such penalty and costs, shall be paid to the person so convicted, if demanded within 3 cal. months ; and, if not so demanded, shall be paid to the Colonial Treasurer, &c. ;" and, if sufficient goods cannot be found before the return day of the said warrant, whereon to levy for the said penalty and costs, on the same being certified by writing on the back of such warrant under the hand of the person appointed to execute the same, the offender to be committed for not exc. 14 days where penalty is not more than £5, and not exc. 3 cal. months where penalty shall be of greater amount,—the term of imprisonment to be computed from time of arrest only.

(y) *Witness*.—By s. 27, Any person having been subpoenaed (according to the Act), and not attending at the time and place mentioned in his subpoena, without reasonable cause, or having attended there and refusing to be sworn or to affirm, or refusing to answer any legal questions that may be put to him, without alleging for such refusal a sufficient excuse, to be then allowed by the Justices hearing the case, is liable to be fined not exc. £20. See 11 & 12 Vic., c. 43, s. 7, and the Note to "Witness," *post*.

sold or offered for sale any goods, upon demand thereof by such Justice, &c.

P. Fine not exc. £10: to be recovered as offence (1).

S. *Id.*, s. 18. [*Two Justices*].—(5) Person having obtained any such license, and having in his possession or on his cart, &c., any fermented or spirituous liquors.

P. Fine not exc. £20: to be recovered as offence (1).

S. 13 *Vic.*, No. 36, s. 19. [*Two Justices*].—(6) Any hawker or pedlar carrying, contrary to the provisions of this Act, fermented or spirituous liquors. (z)

P. Fine not exc. £30, or, at discretion, impr. with h. l. in nearest gaol for not exc. 6 cal. m.; if fine adjudged, it is to be recovered as offence (1). (A)

(z) *Search Warrant*].—By s. 19, In case any person shall have reasonable ground for suspecting that any hawker or pedlar is carrying fermented or spirituous liquors, contrary to the provisions of this Act, or otherwise offending against the same, it shall be lawful for such person to make oath before any Justice of the Peace, at his private residence or elsewhere, of the circumstances, and, if it shall appear to such Justice that reasonable ground for suspicion exists, it shall be lawful for such Justice to grant a warrant, authorizing such person to examine and search the person, packs, baggage, boxes, trunks, cases, carts, drays, waggons, boats, or other vehicle or conveyance, of such hawker or pedlar therein named or described,—such warrant to remain in force for such time as shall be therein mentioned; and it shall also be lawful for any Justice of the Peace, Constable, or other Peace Officer, having reasonable ground of suspicion as aforesaid, to examine and search the person, packs, &c., or other vehicles, &c., of any such licensed hawker or pedlar, without a warrant for such purpose; and upon any such person authorized by warrant as aforesaid, or any such Justice of the Peace, Constable, or other Peace Officer, finding any such fermented or spirituous liquors carried contrary to law, to seize the same; and such hawker or pedlar, upon conviction of such offence, in a summary way, before any two or more Justices of the Peace sitting in Petty Sessions, shall forfeit and pay a sum not exceeding thirty pounds, or be confined to hard labour in the nearest common gaol for any period not exceeding six calendar months, at the discretion of such Justices; and it shall be lawful for the Justices in Petty Sessions before whom any such conviction takes place, to order such fermented and spirituous liquors so seized to be sold by auction, by any Chief Constable or licensed auctioneer, at any place the said Justices may appoint; and, after deducting the expenses of such sale, the proceeds thereof shall be paid—one-half to the prosecutor, and the other half to H. M.

(A) *Seizure of Spirituous Liquors*].—Sec. 20 enacts that "Any Justice, Constable, or other Peace Officer, (without warrant), may seize all such spirituous and fermented liquors as shall be hawked and conveyed about, or exposed to sale in any street, road, footpath, or in any booth, tent, stall, or shed, or in any boat or vessel, or any other place whatever, by any person not licensed according to law to sell the same in such place; and the vessels containing the same, and all the vessels and utensils used for drinking or measuring the same, and any cart, dray, or other carriage, and any horse or other animal, employed in drawing or carrying the same, as well as any boat or vessel used in the conveyance of such liquors as aforesaid;" and any one or more Justices, "on his or their own view, or if, after due inquiry and examination, it shall appear to the said Justice or Justices that such liquors were hawked and conveyed about for the purpose of being illegally sold or disposed of by retail," may adjudge the said liquors, and vessels, &c., containing the same, and any cart, &c., used in conveying the same, to be condemned and forfeited; and the same shall be sold, and appropriated as under s. 19: Provided that in all cases where fermented or spirituous liquors shall be carried from one place to another, the burden of proving that such fermented or spirituous liquors were not so carried for sale or exposure for sale, shall be cast upon the party carrying the same. (S. 20).

S. Id., s. 21. [*Two Justices*].—(7) Any hawkers knowingly dealing in or selling any kind of smuggled or contraband goods, wares, or merchandise,—or knowingly dealing in, vending, or selling any goods, &c., fraudulently or dishonestly procured, either by himself, or through others, with his privity and knowledge.

P. Fine, all penalties, &c., to which he is legally subject for such illicit trafficking, and also forfeiture of his license; he is also rendered incapable of obtaining or holding a license for the future.

S. Id., s. 22. [*Two Justices*].—(8) Any person letting out or hiring or lending any license granted to him;—or trading with or under colour of any license granted unto any person whatsoever, or of any license in which his own real name shall not be inserted as the name of the licensee. (Notes (w) (b))

P. Each party to be fined £40, and licensee to forfeit license, and to be incapable of holding a license for the future; fine recoverable as offence (1).

M. Id., s. 17. *Bail comp.*—Any person forging or counterfeiting license;—or travelling with, producing, or showing, with intent to use the same as a genuine instrument, such forged or counterfeited license to any person entitled under this Act to demand the production of such license.

P. H. l. on roads not exc. 6 cal. m.

HOUSE-BREAKING. (c)

See "BURGLARY," "LARCENY."

F. 7 & 8 G. IV., c. 29, s. 12. *Bail disc.*—(1) Breaking and entering

(b) *Decision*.—A person sending his own goods, &c., to a town not his residence, and there selling them, would seem to be liable to the penalty for trading without a hawkers license. (*Dean v. King*, 4 B. & A., 517). An auctioneer, in like manner, sending and selling his own goods, is liable. (*R. v. Turner*, 4 B. & A., 510).

(c) *Stealing in a Dwelling-house and House-breaking*.—As regards the offence of stealing in a dwelling-house, care is to be taken to distinguish according as the value of the chattel stolen is or is not below £5 in amount (see s. 12 of 7 & 8 G. IV., c. 29),—in the former of which cases it is punishable merely as a simple larceny,—or as the stealing is accompanied or not by any menace or threat, putting any person being in such dwelling-house in bodily fear; (see 1 Vic., c. 86, s. 5, and *R. v. Etherington*, 2 Leach C. C., 671); either of these two latter offences is, however, justly regarded by our law as a crime of less enormity than that of breaking into a dwelling-house, and stealing therein; and, *a fortiori*, than that of breaking into a dwelling-house by night with intent to commit felony. In order to ensure a conviction for the offence of stealing in a dwelling-house to the value of £5, it is necessary to establish in evidence,—1, the larceny; 2, that the value of the thing taken reached the statutory limit; 3, that the larceny was committed within the dwelling-house of the prosecutor or some other person, (*R. v. Bowden*, 2 Mood. C. C., 285), and that the chattel stolen was "under the protection of the dwelling-house." (See *R. v. Carroll*, 1 Mood. C. C., 89). As to the meaning of the words "dwelling-house," and of the terms "breaking and entering," the reader is referred to title "Burglary;" it will suffice, therefore, here, to notice that the breaking of a house in the day-time must be accompanied with some actual larceny, (*R. v. Amier*, 6 C. & F., 344), in order to constitute the offence technically known as house-breaking. The breaking and entering a dwelling-house in the day-time, with intent to steal therein, is, however, indictable as a misdemeanor at

a dwelling-house, (or a building within the same curtilage, with a communication between them, s. 13), and stealing therein.

P. Tr. 15—10 yrs.; or (*if male*) h. l. on roads 10—5 yrs.; or impr. not exc. 3 yrs., h. l. and s. c. (1 Vic., c. 90, s. 1).

F. *Id.*, s. 14. *Bail disc.*—(2) The like, a building within the curtilage, but no communication between them.

P. The same.

F. *Id.*, s. 15. *Bail disc.*—(3) Breaking and entering any shop, warehouse, or counting-house, and stealing therein any chattel, money, or valuable security.

P. The same. (1 Vic., c. 90, s. 2, adopted by 2 Vic., No. 10).

M. 16 Vic., No. 17, s. 1. *Bail disc.*—(4) Any person found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein.

P. Impr., with or without h. l., for not exc. 3 yrs.

F. *Id.* *Bail disc.*—(5) Any person found by night, having in his possession without lawful excuse, (proof of which to lie on him), any pick-lock, key, crow, jack, bit, or other implement of house-breaking, not necessarily with intent to commit a felony. (See *R. v. Bailey*, 1 Dears., C. C., 244; 23 L. J. M. C., 13).

P. The same.

F. *Id.* *Bail disc.*—(6) Any person found by night having his face blackened, or otherwise disguised, with intent to commit any felony.

P. The same.

F. *Id.* *Bail disc.*—(7) Any person found by night in any dwelling-house or other building whatsoever, with intent to commit any felony.

P. The same.

MEM.—On a subsequent conviction for these four last offences, after a previous conviction for a felony or such offence, to be liable to transportation for not less than 7 yrs., and not exc. 10 yrs., or impr., with or without h. l., not exc. 3 yrs. (S. 2). Night-time is the same as in Burglary, (s. 13). See "Burglary." By s. 13, these provisions do not repeal Vagrant Act, 15 Vic., No. 4.

F. 3 W. IV., No. 3, s. 13. *Bail disc.*—(8) Any person concealing or receiving any goods, chattels, money, bill, note, or effects whatsoever that shall have been feloniously stolen by means of force, or putting in bodily fear, from the person, or from the dwelling-house of another person, knowing the same to have been so stolen.

Common Law. (*R. v. Lawes*, 1 C. & K., 62). *R. v. M'Pherson*, (26 L. J. M. C., 134), decides that on an indictment charging a person with breaking and entering a house, and stealing certain specified chattels, he cannot, though he broke into the house with an intent to steal whatever he might find, be convicted of breaking and entering the house, and attempting to steal, (under 16 Vic., No. 18, s. 9), if the chattels in question had been removed from the house before the prisoner went to it. Cockburn, C. J.: An attempt to commit an offence is clearly distinguishable from an intent or intention to commit it. The attempt must be the taking some step towards the offence, so that, if it had succeeded, the whole offence would have been committed. The party might have been convicted of the attempt on this indictment, had the things which he is alleged to have attempted to steal been in the house at the time.

P. Tr. life; or (*if male*) h. l. on roads 15—7 yrs.

F. *Id.*, s. 13. *Bail disc.*—(9) Any person receiving, harbouring, or concealing any such robber or house-breaker, knowing him to have committed such felony.

P. Death.

M. at *Com. Law.* *Bail disc.*—(10) Breaking or entering a house, shop, &c., in the day-time, with intent to steal, but no larceny committed.

P. Fine or impr., or both.

HUSBAND AND WIFE.

See "EVIDENCE," "WITNESS."

IMMIGRANTS.

S. 18 *Vic.*, No. 29, s. 9. [*Two Justices*].—Any person employing, retaining, harbouring, or concealing any immigrant of any of the classes or descriptions mentioned in the said recited Act, (16 *Vic.*, No. 42), who shall not have re-paid or procured to be re-paid the amount due for his passage-money, and shall not have taken service with an employer who shall have paid or secured payment thereof to the said Immigration Agent.

P. Fine of the amount of passage money due, to be paid to Immigration Agent: to be recovered either by distress, (s. 19 of 11 & 12 *Vic.*, c. 43), or according to the procedure of 5 W. IV., No. 22. (See, *ante*, "Abattoir," (Note A), and, *post*, *ex parte* Cockburn, Part III.)

N.B.—*The fine shall not be awarded, if defendant can prove that he has not been guilty of undue negligence.*

IMPOUNDING ACT.

S. 19 *Vic.*, No. 36, s. 6. (D) [*Two Justices*].—(1) Any poundkeeper

(D) 19 *Vic.*, No. 36, s. 1. In the construction of this Act, the term "cattle," or "head of cattle," shall include horses, mares, geldings, colts, fillies, asses, mules, bulls, cows, oxen, heifers, steers, and calves; and the word "sheep" shall include rams, ewes, sheep, and lambs.

The term "poundkeeper" shall include any person who may have the authorized charge of any pound, whether gazetted or not, or whether he shall have any other office or designation or not.

The term "Petty Sessions" shall refer to the Justices assembled in Petty Sessions, at a Court of Petty Sessions holden nearest to the pound respecting which such reference shall be made, or place where cattle may be detained instead of being impounded.

The term "owner" and "occupier" of lands, shall include any occupant of Crown waste lands under any lease, license, or other proper authority; and any overseer or other authorized person acting for such occupant.

Appointment and Removal of Poundkeepers.—By s. 2, The Governor shall establish pounds; and, by s. 3, The majority of the Justices in Petty Sessions assembled for any district in which any pound is situate, shall select some fit and proper person to be poundkeeper; but pounds already existing are continued.

S. 4. If any poundkeeper shall be guilty of any neglect or offence under this Act, or shall not perform his duties to the Justices' satisfaction, he shall be removed; and any vacancy caused by removal or death, or resignation, of poundkeeper, shall be filled in the same manner as is provided for the appointment of poundkeeper,

not keeping up and maintaining the said enclosures (E) in proper repair, or knowingly keeping or permitting to be kept any cattle infected with any contagious disease, in the same enclosure with cattle not so infected, or not keeping the said pound clean and in good order, and the cattle which shall from time to time be impounded therein supplied with a sufficiency of wholesome food and water.

P. Fine not exc. £5 : to be levied by distress ; in default of distress, or, in the discretion of Justices, without ordering any distress, impr., with or without h. l., for not exc. 2 cal. m., if fine and costs be not sooner paid. (S. 35). (F) (11 & 12 Vic., c. 43, ss. 19, 22, 23).

provided that the order for such removal shall be made by a majority of the Justices.

And, by s. 5, A notification of the appointment or removal of any poundkeeper, or the establishment or abolition of any pound, shall be inserted in the *Government Gazette*, and shall be deemed to be evidence that such pound or poundkeeper has been legally appointed, removed, established, or abolished.

(B) By s. 6, The Governor may advance any sum, not exceeding £10, for the erection of one pound in each district where Petty Sessions shall be holden, and every such pound shall be kept in good repair by the keeper at his proper cost, and delivered up at the termination of his office in the like order as received by him, to such persons as appointed by Justices ; and every pound shall be properly fenced and enclosed, and adapted, as far as may be, for keeping cattle infected with contagious disease separate from those in health.

Fees, Damages, &c.—By s. 8, The several sums authorized by this Act (s. 7), shall be deemed to be full satisfaction as pound fees to such poundkeeper for three days, consisting of seventy-two hours next after the time of impounding, and after that time, one-half of the like sum for every additional seventy-two hours, or any part thereof, during which such cattle shall remain impounded ; and, s. 9, These pound fees are exclusive of fees for food, giving notice, &c. ; and, by s. 10, The Justices sitting in the nearest Court of Petty Sessions may fix the fees to be charged for the sustenance of the cattle impounded, and may also appoint and fix the rates as and for ordinary damages which may be demanded by the owner or occupier of any lands for the trespass of any cattle, &c., thereon ; which rates shall be proportioned according to the respective descriptions and value of the crops or grass on the lands trespassed on, and to the description of cattle, &c., trespassing, according to the Schedule marked A, (see Act), subject to the approval of the Governor ; and they may alter and amend such fees, subject as aforesaid ; and such fees, or amended fees, being notified in the *Government Gazette*, may be charged and recovered respectively as aforesaid : Provided that no provision shall be made for damages on cultivated land not securely enclosed, to a greater amount than would be payable if committed on land not cultivated : Provided further, that, if any cattle, &c., be impounded off the same land more than once within three months, the person so impounding may legally claim double the damages so fixed as aforesaid ; and, if any such cattle, &c., be impounded three or more times within six months from off the same land, such person so impounding may legally claim three times the damages so fixed as aforesaid ; and every provision of this Act shall apply and be in force in reference to such double or treble damages as if the ordinary damages alone were claimed.

(F) *Recovery of Penalties*.—The convicting Justices may order that any fine or penalty imposed, and not paid forthwith, be levied by distress and sale of the goods and chattels of the offender ; or, in default of such distress, or in the discretion of such Justice (*sic*), without ordering such distress, may direct that the offender be imprisoned in any gaol or house of correction, with or without hard labour, for a period not exceeding two calendar months if the penalty shall not exceed ten pounds ; or not exceeding four cal. months if the penalty be above ten pounds, and not exceeding twenty pounds ; or not exceeding six cal. months if the penalty be above twenty pounds,—unless such respective penalties and costs shall be sooner paid. (S. 35).

S. Id., s. 12. [*Two Justices*].—(2) Any owner or occupier of land, or other authorized person, impounding any cattle, sheep, goats, or swine, in any pound or place not authorized by this Act, or in any manner contrary to the directions and provisions hereof. (g)

P. Fine not exc. £10 : recoverable as offence (1). (Note r)

S. Id., s. 13. [*Two Justices*].—(3) Any poundkeeper neglecting or refusing to produce a copy of this Act, or the pound-book, for the inspection of any Justice or member of the police force, or of any person desiring to see the same, upon his lawful fee for the same being first paid, or offered to be paid,—or neglecting to make any lawful entry therein. (h)

P. Fine not exc. £5 : recoverable as offence (1). (Note r)

S. 19 Vic., No. 36, s. 13. [*Two Justices*].—(4) Any poundkeeper wilfully delaying to make any entry, or knowingly making any false entry, in the pound-book,—or wrongfully erasing or destroying any entry previously made therein. (h)

P. Fine not exc. £20 : to be levied by distress ; in default of distress, or, in the discretion of Justices, without ordering any distress, impr., with or without h. l., for not exc. 2 cal. m. if the fine does not exc. £10 ; not exc. 4 cal. m. if fine exc. £10, but less than £20,—unless penalties and costs be sooner paid. (S. 35). (Note r)

S. Id., s. 14. [*Two Justices*].—(5) Any poundkeeper failing to keep and maintain in proper repair, on some conspicuous part of said pound, a board having painted thereon, in legible white characters on a black

(g) All cattle, sheep, goats, or swine shall be sent to the public pound nearest to the land where the same were trespassing, and the person impounding them shall specify, in a written memorandum, to the poundkeeper the number and kinds of cattle, &c., impounded, and the name of the owner or supposed owner,—or otherwise state that he is wholly unknown to the person impounding,—the place where the said cattle, &c., were trespassing, and amount of damages claimed for the trespass. (S. 12).

The Justices in Petty Sessions assembled may assess the costs, charges, and expenses attending the driving of any cattle, &c., to pound : Provided that if the owner of such animals so trespassing shall be dissatisfied with such charges, he may apply to the nearest Court of Petty Sessions, which shall have power to summon and examine on oath, in a summary way, all parties, and their witnesses, and to assess such damages as shall be reasonable and fair ; and such assessment shall be conclusive between such parties ; and such Court shall have power to order (if necessary) so many of such trespassing animals to be sold as shall pay all such damages, as well as all fees due to the poundkeeper. (S. 11).

(h) Every poundkeeper shall have a copy of this Act, and shall also keep a pound-book, in the Form in the Schedule marked B, (see Act) ; and shall enter therein, in a legible hand, the particulars of all cattle, &c., impounded, specifying the day and hour when, and cause for which, and person by whom, the same were impounded,—the time and mode of giving notice of the said impounding,—when and in what manner the same were released, by whose order, and to whom delivered,—the particulars of all sales, and of the proceeds thereof ;—such entries to be made at the time the said acts were done, as nearly as possible, but not after any dispute shall have arisen ; and a copy of this Act and of the said pound-book shall, once in every month, if such pound be not more than twenty-five miles from a Court of Petty Sessions, be produced before the nearest Bench of Magistrates, and shall always be free for the inspection of any Justice or Police Officer, without charge, and of any other person on payment of sixpence ; and said poundkeeper shall grant extracts from said pound-book on payment of one shilling for not more than one hundred words, and for any subsequent number not over one hundred, sixpence. (S. 13).

ground, a table of all the fees and charges he is authorized by this Act to demand and receive, together with all rates of damages allowed by authority of the Justices in Petty Sessions as aforesaid;—or neglecting to make any alteration therein which may afterwards become necessary, within a reasonable time;—or knowingly painting or causing to be painted any false statement thereon.

P. Fine £1 for every day that such board is not erected, (unless taken down for alteration or repair), or not kept in repair, or a lawful alteration (after a reasonable time) be not made; or 5s. for every day that he shall knowingly permit any false statement to remain on said board: to be levied by distress; in default of distress, or, in the discretion of Justices, without ordering any distress, *impr.*, with or without h. l., for not exc. 2 cal. m. if the fine does not exc. £10; for not exc. 4 cal. m. if fine exc. £10, but less than £20; for not exc. 6 cal. m. if fine exc. £20,—unless such penalties and costs be sooner paid. (S. 35). (Note F)

S. *Id.*, s. 21. (1) [*Two Justices*].—(6) Any poundkeeper taking or

(1) *Poundkeeper's Duty*.—By s. 15. Every poundkeeper shall receive and detain any cattle, &c., impounded, and shall be responsible to the owners for loss or damage sustained by the wilful act or neglect of such poundkeeper, or his servants, but not otherwise; and he may detain all cattle, &c., so impounded till the sum for which the same were impounded, together with the lawful fees and charges, shall be paid and tendered, or till he shall receive the written order of the person impounding such cattle to deliver the same, on payment being made of the lawful fees, &c., exclusive of damages; and, by s. 16. Every poundkeeper, whenever any cattle, &c., shall be impounded for trespass, shall post a written notice on the gate or some other conspicuous place, setting forth a description of such cattle, &c.; and such notice shall remain till such cattle shall have been claimed or otherwise disposed of in due course.

By s. 17. Every poundkeeper shall enter in a book the brands or other marks of any cattle, &c., belonging to any person, with his name and place of residence, who may see fit to have his name and brands thus entered; and for such entry the fee of five shillings shall be paid to the poundkeeper; and it shall be imperative on such poundkeeper to give notice to such person if any cattle, &c., having such brands be impounded, on payment of same fees as hereinafter provided in case the owner of any cattle impounded shall be known.

By s. 18. When any impounded cattle, &c., shall not be immediately claimed by the owner, or some one in his behalf, the poundkeeper shall, within twenty-four hours after the same are impounded, send notice in writing to the usual place of residence of the owner, if known; or, if the animals have any registered brands, to the person so registering, or to his agent, provided such persons live within ten miles of said pound; and if at a greater distance, such notice shall be sent by post; and shall contain the same particulars as are to be given to the poundkeeper by the person impounding, and also notice of the time when, and place where, the said cattle, &c., will be sold, if not sooner released, and also the sum of money for which the same were impounded; and if neither owner nor agent be known, and the brands be not registered, the like notice shall be posted at the nearest Court of Petty Sessions, and a notice in the Form in Schedule C (see Act) be inserted in the next *Government Gazette* published after twenty-four hours from the time that said cattle, &c., were impounded, in which the same can possibly be inserted; but, when the cattle impounded shall consist of not more than two sheep, goats, swine, or calves, the notice affixed on the pound shall be sufficient; provided that such notice as above-mentioned shall in all cases be sent by post, if required. SS. 19 and 20 provide for the fees payable to the poundkeeper for sending the above notices, and for the securities to be given by the poundkeeper.

Proceeding before Sale.—By s. 22. Where any impounded cattle shall not be released within seven days after notice has been delivered or left, or within twen-

demanding any greater sum for impounding any cattle, &c., or for pound fees or fees for damage or sustenance, or for doing any other matter or thing than such poundkeeper is authorized by this Act or the Justices in Petty Sessions assembled;—or failing to pay to the person impounding any cattle, &c., any damages received from the owner on account of such impounding;—or neglecting or failing to provide proper and sufficient sustenance for any cattle, &c., impounded, or to take due care thereof respectively;—or riding or using any cattle, &c.;—or failing to comply with, or offending against, any of the provisions of this Act; or otherwise misconducting himself as such poundkeeper.

P. Fine not exc. £50, and to be removed from office at Justices' discretion; fine recoverable as offence (5).

S. *Id.*, s. 23. [*Two Justices*].—(7) Any poundkeeper or clerk of Petty Sessions failing or neglecting to do and perform the several matters directed by s. 23 (κ) by them respectively to be done and performed, or any of them.

P. Fine not exc. £5 for every such offence: recoverable as offence (1).

S. *Id.*, s. 24. [*Two Justices*].—(8) Any person offending against the provisions of section 24, (L) contrary to the true intent and meaning hereof.

ty-one days after notice has been sent by post, or inserted in the *Government Gazette*, exclusive of the day on which such notice shall have been delivered or sent or inserted, the poundkeeper may apply to a Justice, not being a party interested, for an order for the sale of the said cattle, and at the time of application shall produce and show to the said Justice the pound-book kept by him, or an extract therefrom applicable to the case, and such other proof, on oath, by himself and others as required, that he has complied with the provisions of this Act; and thereon the said Justice, if satisfied that the Act has been complied with, may make an order under his hand, authorizing the sale of said cattle, or otherwise shall first direct such acts to be done as have been omitted, and suspend the order for said sale till a future day, and till said provisions have been complied with; notice of which suspension and future time of sale shall be given by the said poundkeeper in the same manner as is provided for the original notice of impounding: Provided that where such delay and suspension of sale shall be necessary through said poundkeeper's neglect, the costs of all further proceedings and notices, as well as of the future maintenance of said cattle, shall be borne by him.

(κ) By s. 23, Every poundkeeper shall, at the end of every month, furnish to the Clerk of Petty Sessions an account, in writing, in the Form in Schedule D, (see Act), of all impounded cattle sold during the previous month; and the Clerk shall verify the same, and compare the *entries* of sales with the *notices* thereof required by the Act, and cause any error or omission to be rectified by said poundkeeper, and shall forward the same, with a certificate of the correctness thereof, to the Colonial Treasurer; and a copy of such account shall be affixed in the Court House for one month, for general information.

(L) By s. 24, All sales of impounded cattle shall take place on the tenth day after the same were impounded, in all cases where the above-mentioned notice has been delivered or left; and, in all other cases, on the twenty-fourth day after such notice shall have been sent by post or inserted in the *Government Gazette*, unless such days shall be Sunday, Christmas Day, or Good Friday, and then on the following day; and unless the sale be suspended by order of the competent Justice, as above mentioned, and then, on the day appointed anew by him; and all such sales shall take place at the pound where the cattle were impounded, at the hour of noon; and not more than ten sheep or goats, or five pigs, or one horse, or one head of other cattle, shall be put up in one lot; and neither the person who impounded the same, nor the poundkeeper, nor his surety, nor the Justice who made the order for sale, shall personally or by another purchase said cattle.

P. Fine £5 for every such purchase : recoverable as offence (5).

S. Id., s. 29. [Two Justices].—(9) Any person rescuing, or inciting or assisting any person to rescue, any cattle, &c., lawfully seized to be impounded ; or breaking down, injuring, or destroying any pound legally

Application of Proceeds of Sale not released].—By s. 25, The poundkeeper is to receive the proceeds of cattle not released, and, after deducting fees and damages, to pay balance to Colonial Treasurer. If not claimed in two years, the Governor to direct the same to go to some charitable institution.

Proceeding on complaint, &c., of Person entitled to impound].—By s. 26, Any person entitled to impound may send cattle, &c., found trespassing to their owner, or his overseer, and demand payment of the damage done according to such rate, (see s. 10) ; and thereon such owner, or his overseer, shall and is hereby required to pay the same as and for a satisfaction of the said trespass ; and if the owner, or some person on his behalf, will not pay such fixed rate of damage on demand, the party aggrieved by such trespass may, instead of impounding the cattle, &c., make his complaint to a Justice, who shall summon the owner of the cattle, &c., so having trespassed, to appear before the Justices in nearest Petty Sessions assembled, and these Justices shall determine on such complaint ; and, on proof that such cattle, &c., had trespassed, and that the owner had neglected or refused to pay the damages claimed, shall order and award that such damages be immediately paid ; and, in default, shall issue their warrant to levy the same, together with such costs as shall be just and reasonable. [N.B.—*This appears to be the meaning of this ungrammatical sentence.*]

Where amount of Damages disputed by the Owner of Cattle, &c.]—By s. 27, In case any cattle, &c., be impounded, and larger damages claimed than the scale authorized by the Justices (s. 10) as for ordinary damages, and the owner shall dispute such damages, or the nature of the trespass committed, or deny the legality of such impounding, then such owner may allow such cattle, &c., to remain in such pound till the case be decided as hereinafter provided, or otherwise pay the damages demanded, with the authorized fees, and release said cattle, &c., giving at the same time notice in writing to the poundkeeper that he intends to appeal against such damages or impounding ; and, on the receipt of such notice, such poundkeeper shall not pay over such damages, but keep the same in his possession till the Justices' decision thereon, as hereinafter provided ; and

By s. 28, The owner of cattle, &c., so impounded, where the impounding or damages shall be disputed, may make his complaint to any Justice, who shall summon the person complained of to appear before the nearest Justices sitting in Petty Sessions, who shall summarily inquire into and determine such complaint ; and, on satisfactory proof of such trespass and of the injury done, or of the legality of the impounding, respectively, shall order and award that such damages are legal and proper ; and thereupon, if such cattle shall have continued in the pound, the same course shall be observed in regard to their detention, sale, &c., as if they had been impounded under ordinary circumstances, except that they shall not be released by the owner till the damages so confirmed be paid ; and in case the owner shall have released the said cattle, &c., by payment of the damages and fees, then, on receiving a written order from the adjudicating Justices, or one of them, the poundkeeper shall hand over to the party impounding the damages received ; but if it shall appear that such impounding was illegal, or the damages claimed excessive, and that the ordinary damages would have satisfied the merits of the case, then such Justices shall order accordingly, and assess the amount of compensation for loss of time, labour, additional pound fees, or otherwise, which the owner of such cattle so impounded illegally, or on which such excessive damages may have been claimed, shall be entitled to ; and such owner shall recover the same as hereinbefore directed for recovery of damages according to any rate so allowed as aforesaid.

Appeal].—By s. 37, Any person adjudged to pay any penalty, &c., amounting to twenty pounds, may appeal to the next Quarter Sessions held at or nearest to the district, on giving immediate notice to the Justices of his intention to appeal, and finding sufficient security for prosecuting such appeal, and abiding the determination of the Court thereon.

By s. 34, This Act does not prevent actions for special damage.

constituted, whether cattle shall be impounded therein or not; or committing any pound breach or rescue, whereby any cattle of any description shall escape or be enlarged from such pound; or rescuing or attempting to rescue, or in any manner interfering with, any cattle impounded, and then in the charge and custody of any poundkeeper. (M)

P. Fine not exc. £20 : recoverable as offence (4).

N.B.—*It shall be lawful for the Justices to award the whole or any part of such penalty to the person on whose behalf such cattle were distrained.*

S. *Id.*, s. 31. [Two Justices].—(10) Any person driving away any cattle, &c., other than his own, or his master's or employer's, from the land or out of the herds and flocks of any other person; or failing to give notice of the time he intends to drive away any cattle, &c., from the land or out of the herds or flocks of any other person,—to such last-mentioned person, or his overseer or bailiff; or entering upon any other person's lands for the purpose of driving away such cattle, &c.; or attempting to drive the same without giving such notice.

P. Fine not exc. £10 : recoverable as offence (1). [Such person may be apprehended on the spot by the owner or agent, and taken before the nearest Justice, who shall admit him to bail to appear at the nearest Petty Sessions: Provided that no such entry shall be made on the lands of another more than once in three consecutive months].

S. *Id.*, s. 32. [Two Justices].—(11) Any entire horse or bull, above the age of one year, being impounded or detained under the provisions of this Act.

P. Damages not exc. £5 for every such horse or bull, to be paid to the party impounding, (besides all the legally authorized poundage fees) : recoverable as offence (5). (N)

N.B.—*If the owner, or other authorized person, shall not release any such animal, and such animal shall not realise at the poundkeeper's sale sufficient to pay the said £5, besides the authorized poundage fees, such owner shall pay the balance to such impounding party: to be recovered before two Justices.*

INCLOSED LANDS.

S. 18 *Vic.*, No. 27, s. 1. [One Justice].—(1) Any person, without lawful excuse, entering into the inclosed lands (o) of any other person,

(M) By s. 30, Subject to certain provisions, the poundkeeper may take cattle, &c., out of pound, to feed, graze, or water.

(N) *Occupants of Crown Lands may impound*.—By s. 33, Any person in occupation of land by lease, license, or other authority, granted by or on behalf of the Crown, is hereby empowered to impound any cattle, sheep, goats, or swine, trespassing thereon: Provided that it shall not be lawful for any occupier of any such land through which any public road or thoroughfare may pass, such land not being enclosed, to impound the cattle, &c., of any person travelling along or through any such road, or stopping upon such land during one night or day for necessary rest: provided that such cattle shall not be at a greater distance from the centre of such road or thoroughfare than one quarter of a mile, and shall not be affected with either catarrh or scab, or other infectious disease.

(o) *Interpretation*.—The words "Inclosed Lands" in this Act shall mean any lands, either private or public, which may be inclosed or surrounded with any fence, wall, or other erection, by which the boundaries thereof may be known or recognized; and the word "person" shall be deemed to extend to any body corporate. (S. 6).

without the consent of the owner or occupier thereof, or the person in charge of the same.

N.B.—*The proof of such lawful excuse shall be upon the person charged with any offence against the provisions of this enactment.*

P. Fine not exc. £5 : to be recovered either by distress, (11 & 12 Vic., c. 43, s. 19), or according to the procedure of 5 W. IV., No. 22. See "Justices, Recovery of Fines," *post*, and *ex parte* Cockburn, *post*, Part III.

S. *Id.*, s. 2. [*One Justice*].—(2) Any person entering into or upon the inclosed lands of any other person, and wilfully or negligently leaving open or down, any gate or slip-panel.

P. Fine not exc. £10 : recoverable as offence (1)

S. *Id.*, s. 3. [*One Justice*].—(3) Any person found committing any offence against this Act, upon being required to give his name and place of abode, giving any false or fictitious name or place of abode. (P)

P. Fine not exc. £5 : recoverable as offence (1). (q)

INDECENCY.

See "ASSAULT," "POLICE," "VAGRANT."

Indecency and lewdness are offences against the public economy, when of an open and notorious character ; as, by frequenting houses of ill-fame, or by some grossly scandalous and public indecency ; for which the punishment at Common Law is fine and imprisonment.

A person exposing himself naked in a public place, or stripping himself naked and bathing near inhabited houses, so that he can be distinctly seen from them, is a misdemeanor. (*R. v. Crunden*, 2 Camp., 89). The offence is not complete unless more than one could in fact see it, however public the place may be. (*R. v. Watson*, 2 Cox, C. C., 376 ; *R. v. Webb*, 18 L. J. M. C., 39).

M. at Com. Law. Bail Disc.—(1) Exposing person naked to public view, [or in an omnibus : see *R. v. Holmes*, 22 L. J. M. C., 122] ; or any notorious lewdness or scandalous conduct, which openly outrages decency.

P. Fine, or impr. (with h. l. : 16 Vic., No. 18, s. 28), or both. See *R. v. Webb*, 2 C. & K., 933.

M. at Com. Law. (R) Bail Disc.—(2) Printing or publishing obscene writings or prints.

(P) *Apprehension*.—Any person found committing any offence against any of the provisions of this Act, and refusing, when thereunto required, to give his name and place of abode, shall be liable to be apprehended by the owner or occupier, or the person in charge, of such inclosed lands, and delivered to the custody of the nearest Constable or Peace Officer, to be taken and conveyed before a Justice of the Peace, to be dealt with according to law. (S. 3).

(q) *Destruction of Goats*.—By s. 4, The proprietor or occupier, or any person having the charge, of any inclosed lands, may destroy any goat found trespassing thereon ; and, by s. 5, Any Constable or Peace Officer may seize or destroy any goat found straying or at large in any road, street, or public place.

(R) *Procuring, &c., Obscene Prints, an Indictable Offence*.—In a recent case, (*Dugdale v. R.*, 22 L. J. M. C., 50), it was held that obtaining and procuring indecent prints and libels, in order and for the purpose of afterwards publishing and disseminating them, was an act done in commencing a misdemeanor, and therefore an indictable offence.

P. Fine, or impr. (with h. l. : 16 Vic., No. 18, s. 28), or both.

N.B.—*For certain statutable provisions, see s. 22 of the Police Act, (2 Vic., No. 2), post, "Police"; and s. 3 of Vagrant Act, (15 Vic., No. 4), post, "Vagrant."*

INSOLVENT.

M. 5 Vic., No. 17, s. 68. Bail comp.—(1) Any Insolvent absconding, or concealing himself within this Colony, with the purpose and intent to evade being served with a summons; (s)—or having been so summoned, and so absconding and concealing himself with intent to evade appearing at the examination to which he was summoned, or to prevent any warrant (Note s) from being executed upon him;—or removing out of the jurisdiction of the Supreme Court, or to remote parts within the Colony, contrary to this Act. (T)

P. Tr. not exc. 7 yrs.; or impr., with or without h. l., not exc. 3 yrs.; or (*if male*) h. l. on roads 5—3 yrs.

M. Id., s. 70. Bail comp.—(2) The wife of any insolvent, or any other person, known or suspected to have in possession any of the estate of the insolvent, or to be indebted to the insolvent, or whom the Court or any Commissioner may see reason to believe capable of giving information concerning the person, trade, dealing, or estate of such insolvent, or any information material to the full disclosure thereof,—having been sworn, and, at the examination before the Supreme Court or Commissioner, wilfully making any false answer to any lawful question put by such Court or Commissioner.

P. The same as perjury. See "Perjury."

M. Id., s. 73. Bail comp.—(3) Any Insolvent guilty of fraudulent insolvency;—(as to what acts constitute fraudulent insolvency, see s. 73).

P. Tr. 15—5 yrs.; or impr., with or without h. l., not exc. 3 yrs.; or (*if male*) h. l. on roads 10—3 yrs.

M. Id., s. 74. Bail comp.—(4) Any person receiving or accepting any alienation, transfer, gift, surrender, delivery, mortgage, or pledge, made by any insolvent of any part of his estate, moneys, or securities for money, effects, or credits, with intent to defraud creditors of insolvent, knowing at the time the same to be fraudulently made.

P. The same.

(s) *Examination of Insolvent*.—By s. 67, The Supreme Court, or any Judge thereof, upon the application of the trustee, &c., may summon any Insolvent before the Supreme Court, or any Commissioner, if the said Judge shall see fit so to order, whether Insolvent has obtained his certificate, and allowance thereof, or not; and, by s. 68, a warrant of apprehension of Insolvent may be granted by such Court or Commissioner.

(T) *Apprehension of Insolvent removing, &c.*—By s. 66, Any Justice of the Peace shall and may, upon the information, on oath, of any trustee or creditor, or other person, that any Insolvent is about to remove, or is making preparations to remove, out of the jurisdiction of the Supreme Court, or to remote parts within this Colony, contrary to this Act, grant a warrant for the apprehension of such Insolvent, and cause such Insolvent to be brought before himself or any other Justice; and any Justice before whom such Insolvent shall be brought shall and may inquire into the matters of the said information, and either commit the said Insolvent to gaol, or discharge him out of custody, according as he shall find such information to be well founded or not.

M. Id., s. 75. Bail comp.—(5) Disposing of, removing, retaining, concealing, embezzling, or receiving any moveable property, moneys, or securities for money, belonging to any insolvent estate attached by virtue of any order for the sequestration thereof, knowing the same to have been attached, and with intent to defeat the said attachment; or hindering, obstructing, or endeavouring to hinder or obstruct, the messenger or other person authorized to make the same. (v)

P. Impr., with or without h. l., not exc. 3 yrs.

M. 7 Vic., No. 19, s. 10. Bail comp.—(6) Any trustee or official or elected assignee in any insolvent estate, wilfully retaining in his hands, or keeping or having at any bank, or in the hands of any person, for his own private benefit, or otherwise than to the credit of the estate by name, for which he shall be acting, any sum of money exceeding £10, for any longer period than one month; or in any manner fraudulently making away with or appropriating to his own use, or otherwise misapplying, any money or property whatsoever in his hands, or under his custody or care, as such trustee or assignee.

P. Fine not exc. three times the amount of the sum retained, or impr. not exc. 1 yr.

JURIES.

11 Vic., No. 20, s. 8.—*Lists to be corrected by Justices*].—The Clerks of Petty Sessions shall, respectively, before the 20th day of September in every year, cause all the Justices resident within the jurors' districts, respectively, to be summoned to attend a Special Petty Sessions at the usual places of meeting of the Petty Sessions for the police districts in which such towns or places as aforesaid shall be situate, on the first Tuesday in the month of October then next, for the purpose of correcting and allowing the jury lists for such jurors' districts; and the said Justices shall hold a Special Petty Sessions accordingly; and the said Justices, or any two of them, shall sit *de die in diem*, until the said lists shall be corrected and allowed as hereinafter provided; and the Chief Constable of every such district shall then and there produce the list of men qualified and liable to serve on juries as aforesaid, by him prepared and made out as hereinbefore directed; and thereupon the Justices attending such Sessions shall examine the said list, and shall strike out therefrom the names of all persons not liable to serve, or disqualified from serving, upon such juries; and also the names of those who are disabled by lunacy or imbecility of mind, or by deafness, blindness, or other permanent infirmity of body; and also the names of all men of bad fame or of immoral character and repute, (6 W. IV., No. 15, s. 2); and it shall be lawful for such Justices to insert in such list all names improperly omitted, and to correct all errors and inaccuracies therein; and, if the said Justices shall be divided in opinion upon any question as to the striking out or adding of any name, the decision thereof shall be determined by ballot; and when any such list shall be duly corrected at such Sessions, it shall be allowed by

(v) *Search Warrant*].—On the application of the Chief Commissioner, assignee, or any creditor, any Justice may grant a search warrant for stolen or concealed property. (8. 76).

the Justices present, or two of them, who shall sign the original list, and two fair copies thereof, with their allowance thereof, (2 W. IV., No. 3, s. 12); and the Clerk of the Bench at each such Court of Petty Sessions shall receive every list so allowed, and forthwith transmit one of such duplicate fair copies to the Sheriff of the Colony, and shall keep the said original corrected list amongst the records of his office, and have the other fair copy thereof ready to be produced in the Supreme Court, or Circuit Court, or in any Court of Quarter Sessions, when the same shall be required therein.

Liability of Justices.—By s. 36, Every Justice of the Peace who shall have been summoned, as hereinbefore directed, to attend at any Special Petty Sessions for correcting and allowing any jury list, who shall fail or neglect to attend such Special Petty Sessions, without any reasonable cause for such non-attendance, shall be liable to a fine not exceeding the sum of ten pounds, which shall be summarily imposed by the Supreme Court of the Colony, upon the motion of the Attorney-General, and upon the fact of such non-attendance being duly proved on affidavit to the satisfaction of the said Court, (2 W. IV., No. 3, s. 2); and the Clerk of the Bench shall, at the said Special Petty Sessions, make an entry in writing of the name of every Justice of the Peace residing in the jurors' district, and so summoned as aforesaid, distinguishing those that attended and those that were absent at the correction and allowance of the said list as aforesaid; and shall, at the final adjournment of the said Special Petty Sessions, transmit a certificate thereof to the Attorney-General, verified by declaration, which certificate shall be taken to be *prima facie* proof of the non-attendance of the Justices therein stated to have been absent from the said Special Petty Sessions.

M. 11 Vic., No. 20, s. 41. (v) Bail comp.—(1) Any person corruptly influencing or attempting to influence any juror.

P. Fine and impr.

M. Id., s. 41. Bail comp.—Any juror consenting thereto.

P. The same.

JUSTICES.

No. 1.

ANNO UNDECIMO & DUODECIMO VICTORIÆ REGINÆ.—CAP. XLII.

An Act to facilitate the performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to persons charged with Indictable Offences. [14th August, 1848].

I. *For what Offences a Justice of the Peace may grant a warrant or summons to cause a person charged therewith to be brought before him.*—In what cases the party may be summoned instead of issuing a warrant in the first instance.—If the summons be not obeyed, then a warrant may be

(v) SS. 35—39 provide that certain penalties shall be inflicted, on the neglect of certain duties of the Sheriff, his deputy, or any juror.

issued].—Whereas it would conduce much to the improvement of the Administration of Criminal Justice within England and Wales if the several Statutes and parts of Statutes relating to the duties of Her Majesty's Justices of the Peace therein, with respect to persons charged with Indictable Offences, were consolidated, with such additions and alterations as may be deemed necessary, and that such duties should be clearly defined by positive enactment: Be it therefore declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That in all cases where a charge or complaint (A.) shall be made before any one or more of Her Majesty's Justices of the Peace for any county, riding, division, liberty, city, borough, or place, within England or Wales, that any person has committed, or is suspected to have committed, any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever, within the limits of the jurisdiction of such Justice or Justices of the Peace, or that any person guilty, or suspected to be guilty, of having committed any such crime or offence elsewhere out of the jurisdiction of such Justice or Justices, is residing or being, or is suspected to reside or be, within the limits of the jurisdiction of such Justice or Justices, then and in every such case, if the person so charged or complained against shall not then be in custody, it shall be lawful for such Justice or Justices of the Peace to issue his or their warrant (B.) to apprehend such person, and to cause him to be brought before such Justice or Justices, or any other Justice or Justices for the same county, riding, division, liberty, city, borough, or place, to answer to such charge or complaint, and to be further dealt with according to law: Provided always, that in all cases it shall be lawful for such Justice or Justices to whom such charge or complaint shall be preferred, if he or they shall so think fit, instead of issuing in the first instance his or their warrant to apprehend the person so charged or complained against, to issue his or their summons (C.) directed to such person, requiring him to appear before the said Justice or Justices at a time and place to be therein mentioned, or before such other Justice or Justices of the same county, riding, division, liberty, city, borough, or place, as may then be there, and if after being served with such summons in manner hereinafter mentioned he shall fail to appear at such time and place, in obedience to such summons, then and in every such case the said Justice or Justices, or any other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, may issue his or their warrant (D.) to apprehend such person so charged or complained against, and cause such person to be brought before him or them, or before some other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, to answer to the said charge or complaint, and to be further dealt with according to law: Provided nevertheless, that nothing herein contained shall prevent any Justice or Justices of the Peace from issuing the warrant hereinbefore first mentioned at any time before or after the time mentioned in such summons for the appearance of the said accused party.

II. *Warrant to apprehend for Offences committed on the High Seas or abroad*].—That in all cases of indictable crimes or offences of any kind

or nature whatsoever committed on the high seas, or in any creek, harbour, haven, or other place in which the Admiralty of England have, or claim to have, jurisdiction, and in all cases of crimes or offences committed on land beyond the seas for which an indictment may legally be preferred in any place within England or Wales, it shall be lawful for any one or more of Her Majesty's Justices of the Peace for any county, riding, division, liberty, city, borough, or place, within England or Wales, in which any person charged with having committed or with being suspected to have committed any such crime or offence shall reside or be, or shall be supposed or suspected to reside or be, to issue his or their warrant (E.) to apprehend the person so charged, and to cause him to be brought before him or them, or some other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, to answer to the said charges, and to be further dealt with according to law. (See "Admiralty.")

III. *Warrant to apprehend a party against whom an Indictment is found.*—*If person indicted be already in prison for some other offence, Justice may order him to be detained until removed by writ of Habeas.*—That where any indictment shall be found by the Grand Jury in any Court of Oyer and Terminer or General Gaol Delivery, or in any Court of General or Quarter Sessions of the Peace, against any person who shall then be at large, and whether such person shall have been bound by any recognizance to appear to answer to the same or not, the person who shall act as Clerk of the Indictments at such Court of Oyer and Terminer or Gaol Delivery, or as Clerk of the Peace at such Sessions, at which the said indictment shall be found, shall at any time afterwards, after the end of the Sessions of Oyer and Terminer or Gaol Delivery, or Sessions of the Peace, at which such indictment shall have been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate (F.) of such indictment having been found; and upon production of such certificate to any Justice or Justices of the Peace for any county, riding, division, liberty, city, borough, or place, in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such Justice or Justices, and he and they are hereby required, to issue his or their warrant (G.) to apprehend such person so indicted, and to cause him to be brought before such Justice or Justices, or any other Justice or Justices for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law, and afterwards, if such person be thereupon apprehended and brought before any such Justice or Justices, such Justice or Justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit (H.) him for trial, or admit him to bail, in manner hereinafter mentioned; or if such person so indicted shall be confined in any gaol or prison for any other offence than that charged in the said indictment, at the time of such application, and production of the said certificate to such Justice or Justices as aforesaid, it shall be lawful for such Justice or Justices, and he and

they are hereby required, upon it being proved before him or them upon oath or affirmation that the person so indicted and the person so confined in prison are one and the same person, to issue his or their warrant (I.) directed to the gaoler or keeper of the gaol or prison in which the person so indicted shall then be confined as aforesaid, commanding him to detain such person in his custody until by Her Majesty's writ of Habeas Corpus he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of his custody by due course of law.

IV. *Justices may issue Warrants on Sundays*.—That it shall be lawful for any Justice or Justices of the Peace to grant or issue any warrant as aforesaid, or any search warrant, on a Sunday as well as on any other day.

V. *Justices for adjoining counties, &c., may act as such for one county, &c., while residing in another*.—All acts of Justice, &c., to be valid.—*Constables, &c., apprehending offenders in one such county, &c., may take them before such Justice in the adjoining county, &c., if he act as a Justice in both*.—That in cases where a Justice of the Peace for any county, riding, division, liberty, city, borough, or place, shall be also Justice of the Peace for a county, riding, division, liberty, city, borough, or place next adjoining thereto, or surrounded thereby, it shall and may be lawful for such Justice of the Peace to act as such Justice for the one county, riding, division, liberty, city, borough, or other place, whilst he is residing or happens to be in the other such county, riding, division, liberty, city, borough, or other place, in all matters and things hereinbefore or hereafter in this Act mentioned; and that all such acts of such Justice, and the acts of any constable or other officer in obedience thereto, shall be as valid, good, and effectual in the law to all intents and purposes as if such Justice at the time he shall so act as aforesaid were in the county, riding, division, liberty, city, borough, or other place, for which he shall so act; and all constables and other officers for the county, riding, division, liberty, city, borough, or place, for which such Justice shall so act as aforesaid, are hereby authorized and required to obey the warrants, orders, directions, act, or acts of such Justice which in that behalf shall be granted, given, or done, and to do and perform their several offices and duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty; and any such constable or other peace officer, or any other person apprehending or taking into custody any person offending against law, and whom he lawfully may and ought to apprehend or take into custody, by virtue of his office or otherwise, in any such county, riding, division, liberty, city, borough, or place, may lawfully take and convey such person so apprehended and taken as aforesaid to and before any such Justice of the Peace for such county, riding, division, liberty, city, borough, or place, whilst such Justice shall be in such adjoining county, riding, division, liberty, city, borough, or place as aforesaid, and the said constables and other peace officers, and all such other persons as aforesaid, are hereby authorized and required in all such cases so to act in all things as if the said Justice of the Peace were within the said county, riding, division, liberty, city, borough, or place, for which he shall so act.

VI. *Justices for a county, &c., may act for it in an adjoining city or*

place of exclusive jurisdiction.—Not to give power to act, &c., in any matters, &c., arising within the same.—That it shall be lawful for any Justice or Justices of the Peace acting for any county at large, or for any riding or division of such county, to act as such at any place within any city, town, or other precinct, being a county of itself, or otherwise having exclusive jurisdiction, and situated within, surrounded by, or adjoining to any such county, riding, or division respectively, and that all and every such act and acts, matters and things, to be so done by such Justice or Justices within such city, town, or precinct, as Justice or Justices for such county, riding, or division respectively, shall be as valid and effectual in law as if the same had been done within such county, riding, or division respectively, to all intents and purposes whatsoever: Provided always, that nothing in this Act contained shall extend to give power to the Justices of the Peace for any county, riding, or division, not being also Justices for such city, town, or other precinct, or not having authority as Justices of the Peace therein, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever.

VII. *For removal of doubts as to powers given to Justices, &c., in detached parts of counties under 2 & 3 Vict., c. 82].—‘And whereas doubts have arisen whether the powers given to Justices by an Act passed in the Session of Parliament held in the second and third years of the reign of Her present Majesty, intituled, An Act for the better administration of Justice in detached parts of counties, are applicable to cases of summary jurisdiction and to acts merely ministerial:’* Be it hereby declared and enacted, That all the acts of any Justice or Justices, and of any constable or officer in obedience thereto, shall be as good in relation to any detached part of any county which is surrounded in whole or in part by the county for which such Justice or Justices acts or act as if the same were to all intents and purposes part of the said county; and all constables and other officers of such detached part are hereby required to obey the warrants, orders, and acts of such Justice or Justices, and to perform their several duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty.

VIII. *When charge, &c., is made, if a warrant is to be issued, information, &c., on oath, to be laid before Justices.—If summons to be issued instead, information, &c, not necessary to be on oath.—No objection allowed for alleged defect in form].—That in all cases where a charge or complaint for any indictable offence shall be made before such Justice or Justices as aforesaid, if it be intended to issue a warrant in the first instance against the party or parties so charged, an information and complaint thereof (A.) in writing, on the oath or affirmation of the informant, or of some witness or witnesses in that behalf, shall be laid before such Justice or Justices: Provided always, that in all cases where it is intended to issue a summons instead of a warrant in the first instance, it shall not be necessary that such information and complaint shall be in writing, or be sworn to or affirmed in manner aforesaid, but in every such case such information and complaint may be by parol merely, and without any oath or affirmation whatsoever to support or substantiate the same: Provided also, that no objection shall be taken or allowed to any such*

information or complaint for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the Justice or Justices who shall take the examination of the witnesses in that behalf, as hereinafter mentioned.

IX. *Upon complaint being laid, Justices receiving the same may issue summons or warrant for appearance of person charged.—How summons to be served.—If party summoned do not attend, Justice may issue a warrant to compel attendance.—No objection allowed for alleged defect in form, &c.*]—That upon such information and complaint being so laid as aforesaid, the Justice or Justices receiving the same may, if he or they shall think fit, issue his or their summons or warrant respectively, as hereinbefore is directed, to cause the person charged as aforesaid to be and appear before him or them, or any other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law; and every such summons (C.) shall be directed to the party so charged in and by such information, and shall state shortly the matter of such information, and shall require the party to whom it is so directed to be and appear at a certain time and place therein mentioned before the Justice who shall issue such summons, or before such other Justice or Justices of the Peace of the same county, riding, division, liberty, city, borough, or place, as may then be there, to answer to the said charge, and to be further dealt with according to law; and every such summons shall be served by a constable or other peace officer upon the person to whom it is so directed by delivering the same to the party personally, or, if he cannot conveniently be met with, then by leaving the same with some person for him at his last or most usual place of abode; and the constable or other peace officer who shall have served the same in manner aforesaid shall attend at the time and place, and before the Justices, in the said summons mentioned, to depose, if necessary, to the service of such summons; and if the person so served shall not be and appear before the Justice or Justices at the time and place mentioned in such summons, in obedience to the same, then it shall be lawful for such Justice or Justices to issue his or their warrant (D.) for apprehending the party so summoned, and bringing him before such Justice or Justices, or some other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, to answer the charge in the said information and complaint mentioned, and to be further dealt with according to law: Provided always, that no objection shall be taken or allowed to any such summons or warrant for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the Justice or Justices who shall take the examinations of the witnesses in that behalf, as hereinafter mentioned; but if any such variance shall appear to such Justice or Justices to be such that the party charged has been thereby deceived or misled, it shall be lawful for such Justice or Justices, at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the meantime to remand the party so charged, or admit him to bail, in manner hereinafter mentioned.

X. *Warrant to apprehend parties to be under hand and seal of Justice.—How Warrant to be directed, and to whom.—How and where Warrant*

*may be executed.—No objection allowed for alleged defect in form, &c.]—*That every warrant (B.) hereafter to be issued by any Justice or Justices of the Peace to apprehend any person charged with any indictable offence, shall be under the hand and seal or hands and seals of the Justice or Justices issuing the same, and may be directed either to any constable or other person by name, or generally to the constable of the parish or other district within which the same is to be executed, without naming him, or to such constable and all other constables or peace officers in the county or other district within which the Justice or Justices issuing such warrant has or have jurisdiction, or generally to all the constables or peace officers within such last-mentioned county or district, and it shall state shortly the offence on which it is founded, and shall name or otherwise describe the offender, and it shall order the person or persons to whom it is directed to apprehend the offender, and bring him before the Justice or Justices issuing the said warrant, or before some other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, to answer to the charge contained in the said information, and to be further dealt with according to law; and it shall not be necessary to make such warrant returnable at any particular time, but the same may remain in force until it shall be executed; and such warrant may be executed by apprehending the offender at any place within the county, riding, division, liberty, city, borough, or place, within which the Justice or Justices issuing the same shall have jurisdiction, or in case of fresh pursuit at any place in the next adjoining county or place, and within seven miles of the border of such first-mentioned county, riding, division, liberty, city, borough, or place, without having such warrant backed as hereinafter mentioned; and in all cases where such warrant shall be directed to all constables or other peace officers within the county or other district within which the Justice or Justices issuing the same shall have jurisdiction, it shall be lawful for any constable, headborough, tithingman, borsholder, or other peace officer for any parish, township, hamlet, or place, within such county or district, to execute the said warrant within any parish, township, hamlet, or place situate within the jurisdiction for which such Justice or Justices shall have acted when he or they granted such warrant, in like manner as if such warrant were directed specially to such constable by name, and notwithstanding the place in which such warrant shall be executed shall not be within the parish, township, hamlet, or place for which he shall be such constable, headborough, tithingman, borsholder, or other peace officer: Provided always, that no objection shall be taken or allowed to any such warrant for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the Justice or Justices who shall take the examinations of the witnesses in that behalf, as hereinafter mentioned; but if any such variance shall appear to such Justice or Justices to be such that the party charged has been thereby deceived or misled, it shall be lawful for such Justice or Justices, at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the meantime to remand the party so charged, or to admit him to bail, in manner hereinafter mentioned.

XI. *Regulations as to the backing of warrants.]—*That if the person

against whom any such warrant shall be issued as aforesaid shall not be found within the jurisdiction of the Justice or Justices by whom the same shall be issued, or if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place in England or Wales out of the jurisdiction of the Justice issuing such warrant, it shall and may be lawful for any Justice of the Peace for the county or place into which such person shall so escape or go, or in which he shall reside or be, or be supposed or suspected to be, upon proof alone being made on oath of the handwriting of the Justice issuing such warrant, to make an indorsement (K.) on such warrant, signed with his name, authorizing the execution of such warrant within the jurisdiction of the Justice making such indorsement, and which indorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables and other peace officers of the county or place where such warrant shall be so indorsed, to execute the same in such other county or place, and to carry the person against whom such warrant shall have issued, when apprehended, before the Justice and Justices of the Peace who first issued the said warrant, or before some other Justice or Justices of the Peace in and for the same county, riding, division, city, liberty, borough, or place, or before some Justice or Justices of the county, riding, division, liberty, city, borough, or place, where the offence in the said warrant mentioned appears therein to have been committed: Provided always, that if the prosecutor, or any of the witnesses on the part of the prosecution, shall then be in the county or place where such person shall have been so apprehended, the constable or other person or persons who shall have so apprehended such person may, if so directed by the Justice backing such warrant, take and convey him before the Justice who shall have so backed the said warrant, or before some other Justice or Justices of the same county or place; and the said Justice or Justices may thereupon take the examinations of such prosecutor or witnesses, and proceed in every respect in manner hereinafter directed with respect to persons charged before a Justice or Justices of the Peace with an offence alleged to have been committed in another county or place than that in which such persons have been apprehended. (See sections 4 & 5 of 14 Vic., No. 43, *post*).

XII. *English warrants may be backed in Ireland, and vice versa, in the event of parties escaping*].—That if any person against whom a warrant shall be issued in any county, riding, division, liberty, city, borough, or place, in England or Wales, by any Justice of the Peace, or by any Judge of Her Majesty's Court of Queen's Bench, or Justice of Oyer and Terminer or Gaol Delivery, for any indictable offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county or place in that part of the United Kingdom called Ireland, or if any person against whom a warrant shall be issued in any county or place in Ireland, by any Justice of the Peace, or by any Judge of Her Majesty's Court of Queen's Bench there, or any Justice of Oyer and Terminer or Gaol Delivery, for any crime or offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county, riding, division, liberty, city, borough, or place, in that part of the United Kingdom

called England or Wales, it shall and may be lawful for any Justice of the Peace in and for the county or place into which such person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, to indorse (K.) such warrant in manner hereinbefore mentioned, or to the like effect, and which warrant so indorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all constables or other peace officers of the county or place where such warrant shall be so indorsed, to execute the said warrant in the county or place where the Justice so indorsing it shall have jurisdiction, by apprehending the person against whom such warrant shall have been granted, and to convey him before the Justice or Justices who granted the same, or before some other Justice or Justices of the Peace in and for the same county or place, and which said Justice or Justices before whom he shall be so brought shall thereupon proceed in such manner as if the said person had been apprehended in the said last mentioned county or place.

XIII. Makes provisions (similar to those of s. 12) with respect to the backing of English warrants in the Isles of Man, Guernsey, Jersey, Alderney, and Sark; and *vice versa*.

XIV. Provides that English or Irish warrants may be backed in Scotland.

XV. Provides that Scotch warrants may be backed in England or Ireland.

XVI. *Power to Justices to summon witnesses to attend and give evidence.—If summons not obeyed, warrant may be issued to compel attendance.—In certain cases warrant may be issued in the first instance.—Persons appearing on summons, &c., refusing to be examined, may be committed].—That, if it shall be made to appear to any Justice of the Peace, by the oath or affirmation of any credible person, that any person within the jurisdiction of such Justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, such Justice may and is hereby required to issue his summons (L. 1.) to such person, under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons before the said Justice, or before such other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode), it shall be lawful for the Justice or Justices before whom such person should have appeared to issue a warrant (L. 2.) under his or their hands and seals to bring and have such person at a time and place to be therein mentioned, before the Justice who issued the said summons, or before such other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to*

testify as aforesaid, and which said warrant may, if necessary, be backed as hereinbefore is mentioned, in order to its being executed out of the jurisdiction of the Justice who shall have issued the same; or if such Justice shall be satisfied by evidence upon oath or affirmation that it is probable that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his warrant (L. 3.) in the first instance, and which, if necessary, may be backed as aforesaid; and if on the appearance of such person so summoned before the said last-mentioned Justice or Justices, either in obedience to the said summons, or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or, having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any Justice of the Peace then present, and having there jurisdiction, may by warrant (L. 4.) under his hand and seal commit the person so refusing to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place, where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding seven days, unless he shall in the meantime consent to be examined and to answer concerning the premises.

XVII. *As to the examination of Witnesses.*—*Justice to administer oath or affirmation.*—*Depositions of persons who have died, or who are absent, may, in certain cases, be read in evidence*.—That in all cases where any person shall appear or be brought before any Justice or Justices of the Peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such Justice or Justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the Justice or Justices taking the same; and the Justice or Justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such Justice or Justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful

to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the Justice purporting to sign the same.

XVIII. *After examination of the accused, Justice to read depositions taken against him, and caution him as to any statement he may make ; and inform him that he has nothing to hope or fear from either promise or threat*.—That after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the Justice of the Peace, or one of the Justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect :—" Having heard the evidence, do you wish to say anything in answer to the charge ? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial ;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.), and read over to him, and shall be signed by the said Justice or Justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned ; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the Justice or Justices purporting to sign the same did not in fact sign the same : Provided always, that the said Justice or Justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favor, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat : Provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person. (As to the *Caution*, see "*Summary*," *post*, and "*Confession*," p. 68).

XIX. *Place where examination taken not to be deemed an Open Court, and no person to remain without consent*.—That the room or building in which such Justice or Justices shall take such examinations and statement as aforesaid shall not be deemed an open Court for that purpose ; and it shall be lawful for such Justice or Justices, in his or their discretion, to order that no person shall have access to or be or remain in such room or building without the consent or permission of such Justice or Justices, if it appear to him or them that the ends of justice will be best answered by so doing.

XX. *Power to Justice to bind over the prosecutors and witnesses by recognizance.—Recognizance, depositions, &c., to be transmitted to the Court in which the trial is to be had.—Witnesses refusing to enter into recognizances may be committed*.—That it shall be lawful for the Justice or Justices before whom any such witness shall be examined as aforesaid, to bind by recognizance (O. 1.) the prosecutor and every such witness to

appear at the next Court of Oyer and Terminer or Gaol Delivery, or Superior Court of a County Palatine, or Court of General or Quarter Sessions of the Peace, at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, which said recognizance shall particularly specify the profession, art, mystery, or trade of every such person entering into or acknowledging the same, together with his christian and surname, and the parish, township, or place of his residence, and if his residence be in a city, town, or borough, the recognizance shall also particularly specify the name of the street, and the number (if any) of the house in which he resides, and whether he is owner or tenant thereof or a lodger therein; and the said recognizance, being duly acknowledged by the person so entering into the same, shall be subscribed by the Justice or Justices before whom the same shall be acknowledged, and a notice (O. 2.) thereof, signed by the said Justice or Justices, shall at the same time be given to the person bound thereby; and the several recognizances so taken, together with the written information, (if any) the depositions, the statement of the accused, and the recognizance of bail (if any), in every such case, shall be delivered by the said Justice or Justices, or he or they shall cause the same to be delivered, to the proper officer of the Court in which the trial is to be had, before or at the opening of the said Court, on the first day of the sitting thereof, or at such other time as the Judge, Recorder, or Justice who is to preside in such Court at the said trial shall order and appoint: Provided always, that if any such witness shall refuse to enter into or acknowledge such recognizance as aforesaid, it shall be lawful for such Justice or Justices of the Peace, by his or their warrant (P. 1.), to commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party, unless in the meantime such witness shall duly enter into such recognizance as aforesaid before some one Justice of the Peace for the county, riding, division, liberty, city, borough, or place, in which such gaol or house of correction shall be situate: Provided nevertheless, that if afterwards, from want of sufficient evidence in that behalf, or other cause, the Justice or Justices before whom such accused party shall have been brought, shall not commit him or hold him to bail for the offence with which he is charged, it shall be lawful for such Justice or Justices, or any other Justice or Justices of the same county, riding, division, liberty, city, borough, or place, by his or their order (P. 2.) in that behalf, to order and direct the keeper of such common gaol or house of correction where such witness shall be so in custody to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly. (See s. 2 of 14 Vic., No. 43, *post*, as to the transmission of depositions, &c.)

XXI. *Power to Justice to remand the accused from time to time, not exceeding eight days, by warrant.—If remand be for three days only, by verbal order.—Party accused may be admitted to bail, on the examination being adjourned.—If party does not appear upon recognizance, Justice may transmit the same to the Clerk of the Peace.*—That if, from the absence of witnesses, or from any other reasonable cause, it

shall become necessary or advisable to defer the examination or further examination of the witnesses for any time, it shall be lawful to and for the Justice or Justices before whom the accused shall appear or be brought, by his or their warrant (Q. 1.), from time to time to remand the party accused for such time as by such Justice or Justices in their discretion shall be deemed reasonable, not exceeding eight clear days, to the common gaol or house of correction, or other prison, lock-up house, or place of security in the county, riding, division, liberty, city, borough, or place for which such Justice or Justices shall then be acting; or if the remand be for a time not exceeding three clear days, it shall be lawful for such Justice or Justices verbally to order the constable or other person in whose custody such party accused may then be, or any other constable or person to be named by the said Justice or Justices in that behalf, to continue or keep such party accused in his custody, and to bring him before the same or such other Justice or Justices as shall be there acting at the time appointed for continuing such examination: Provided always, that any such Justice or Justices may order such accused party to be brought before him or them, or before any other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, at any time before the expiration of the time for which such accused party shall be so remanded, and the gaoler or officer in whose custody he shall then be shall duly obey such order: Provided also, that, instead of detaining the accused party in custody during the period for which he shall be so remanded, any one Justice of the Peace before whom such accused party shall so appear or be brought as aforesaid may discharge him, upon his entering into a recognizance (Q. 2. 3.), with or without a surety or sureties, at the discretion of such Justice, conditioned for his appearance at the time and place appointed for the continuance of such examination; and if such accused party shall not afterwards appear at the time and place mentioned in such recognizance, then the said Justice, or any other Justice of the Peace who may then and there be present, upon certifying (Q. 4.) on the back of the recognizance the nonappearance of such accused party, may transmit such recognizance to the Clerk of the Peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such nonappearance of the said accused party.

XXII. *If a person be apprehended in one county on charge of an offence committed in another, he may be examined in the former; and if evidence be deemed sufficient, may be committed to prison; if insufficient, to be brought before some Justice in the latter county.—As to payment of expenses of conveying the accused into the proper county, &c.*—And whereas it often happens that a person is charged before a Justice of the Peace with an offence alleged to have been committed in another county or place than that in which such person has been apprehended, or in which such Justice has jurisdiction, and it is necessary to make provision as to the manner of taking the examinations of the witnesses, and of committing the party accused, or admitting him to bail, in such a case: Be it therefore enacted, That whenever a person shall appear or shall be brought before a Justice or Justices of the Peace in the county, riding, division, liberty, city,

borough, or place wherein such Justice or Justices shall have jurisdiction, charged with an offence alleged to have been committed by him in any county or place within England or Wales wherein such Justice or Justices shall not have jurisdiction, it shall be lawful for such Justice or Justices and he and they are hereby required to examine such witnesses, and receive such evidence in proof of such charge as shall be produced before him or them, within his or their jurisdiction; and if in his or their opinion such testimony and evidence shall be sufficient proof of the charge made against such accused party, such Justice or Justices shall thereupon commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place where the offence is alleged to have been committed, or shall admit him to bail, as hereinafter mentioned, and shall bind over the prosecutor (if he have appeared before him or them) and the witnesses by recognizance accordingly as is hereinbefore mentioned; but if such testimony and evidence shall not in the opinion of such Justice or Justices be sufficient to put the accused party upon his trial for the offence with which he is so charged, then such Justice or Justices shall bind over such witnesses as he shall have examined, by recognizance, to give evidence, as hereinbefore is mentioned, and such Justice or Justices shall, by warrant (R. 1.) under his or their hand and seal or hands and seals, order such accused party to be taken before some Justice or Justices of the Peace in and for the county, riding, division, liberty, city, borough, or place where and near unto the place where the offence is alleged to have been committed, and shall at the same time deliver the information and complaint, and also the depositions and recognizances so taken by him or them, to the constable who shall have the execution of such last-mentioned warrant, to be by him delivered to the Justice or Justices before whom he shall take the accused in obedience to the said warrant, and which said depositions and recognizances shall be deemed to be taken in the case, and shall be treated to all intents and purposes as if they had been taken by or before the said last-mentioned Justice or Justices, and shall, together with such depositions and recognizances as such last-mentioned Justice or Justices shall take in the matter of such charge against the said accused party, be transmitted to the Clerk of the Court where the said accused party is to be tried, in the manner and at the time hereinbefore mentioned, if such accused party shall be committed for trial upon the said charge, or shall be admitted to bail; and in case such accused party shall be taken before the Justice or Justices last aforesaid by virtue of the said last-mentioned warrant, the constable or other person or persons to whom the said warrant shall have been directed, and who shall have conveyed such accused party before such last-mentioned Justice or Justices, shall be entitled to be paid his costs and expenses of conveying the said accused party before the said Justice or Justices; and upon the said constable or other person producing the said accused party before such Justice or Justices, and delivering him into the custody of such person as the said Justice or Justices shall direct or name in that behalf, and upon the said constable delivering to the said Justice or Justices the warrant, information (if any), depositions, and recognizances aforesaid, and proving by oath the handwriting of the Justice or Justices who shall have subscribed the same, such Justice or Justices to whom the

said accused party is so produced shall thereupon forthwith ascertain the sum which ought to be paid to such constable or other person for conveying such accused party and taking him before such Justice or Justices, as also his reasonable costs and expenses of returning, and thereupon such Justice or Justices shall make an order (R. 2.) upon the Treasurer of the county, riding, division, or liberty, city, borough, or place, or if such city, borough, or place shall be contributory to the county rate of any county, riding, division, or liberty, then, upon the Treasurer of such county, riding, division, or liberty respectively to which it is contributory, for payment to such constable or other person of the sum so ascertained to be payable to him in that behalf, and the said Treasurer, upon such order being produced to him, shall pay the amount to the said constable or other person producing the same, or to any person who shall present the same to him for payment: Provided always, that if such last mentioned Justice or Justices shall not think the evidence against such accused party sufficient to put him upon his trial, and shall discharge him without holding him to bail, every such recognizance so taken by the said first mentioned Justice or Justices as aforesaid shall be null and void.

XXIII. Power to Justice to admit to bail persons charged with felony and certain misdemeanors.—*Justices may admit to bail in the like cases after commitment for trial.—Justice may admit to bail persons charged with other misdemeanors.—Certain recognizances to be transmitted to committing Justices.—No bail in cases of treason, but by order of Secretary of State, &c.—Where defendant entitled to traverse.*—That where any person shall appear or be brought before a Justice of the Peace charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such Justice of the Peace may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such Justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such Justice shall take the recognizance (S. 1. 2.) of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the Court without leave; and in all cases where a person charged with any indictable offence shall be committed to prison to take his trial for the same, it shall be lawful at any time afterwards, and before the first day of the Sitting or Session at which he is to be tried, or before the day to which such Sitting or Session may be adjourned, for the Justice or Justices of the Peace who shall have signed the warrant for his commitment, in his or their discretion, to admit such accused person to bail in

manner aforesaid; or if such committing Justice or Justices shall be of opinion that for any of the offences hereinbefore mentioned the said accused person ought to be admitted to bail, he or they shall in such cases, and in all other cases of misdemeanors, certify (S. 3.) on the back of the warrant of commitment his or their consent to such accused party being bailed, stating also the amount of bail which ought to be required, it shall be lawful for any Justice of the Peace attending or being at the gaol or prison where such accused party shall be in custody, on production of such certificate, to admit such accused person to bail in manner aforesaid; or if it shall be inconvenient for the surety or sureties in such a case to attend at such gaol or prison to join with such accused person in the recognizance of bail, then such committing Justice or Justices may make a duplicate of such certificate (S. 4.) as aforesaid, and upon the same being produced to any Justice of the Peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for such last-mentioned Justice to take the recognizance of the surety or sureties in conformity with such certificate, and upon such recognizance being transmitted to the keeper of such gaol or prison, and produced, together with the certificate on the warrant of commitment as aforesaid, to any Justice of the Peace attending or being at such gaol or prison, it shall be lawful for such last-mentioned Justice thereupon to take the recognizance of such accused party and to order him to be discharged out of custody as to that commitment, as hereinafter mentioned; and where any person shall be charged before any Justice of the Peace with any indictable misdemeanor other than those hereinbefore mentioned, such Justice after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, shall admit him to bail in manner aforesaid, or if he have been committed to prison, and shall apply to any one of the Visiting Justices of such prison, or to any other Justice of the Peace for the same county, riding, division, liberty, city, borough, or place, before the first day of the Sitting or Session at which he is to be tried, or before the day to which such Sitting or Session may be adjourned, to be admitted to bail, such Justice shall accordingly admit him to bail in manner aforesaid; and in all cases where such accused person in custody shall be admitted to bail by a Justice of the Peace other than the committing Justice or Justices as aforesaid, such Justice of the Peace so admitting him to bail shall forthwith transmit the recognizance or recognizances of bail to the committing Justice or Justices, or one of them, to be by him or them transmitted, with the examinations, to the proper officer; Provided nevertheless, that no Justice or Justices of the Peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of Her Majesty's Secretaries of State, or by Her Majesty's Court of Queen's Bench at Westminster, or a Judge thereof in vacation: Provided also, that when, in cases of misdemeanor, the defendant shall be entitled to a traverse at the next Assizes or Quarter Sessions, and shall not be bound to take his trial until the second Assizes or Sessions, in every such case the recognizance (S. 1.) of bail shall be conditioned that he shall appear and plead at the next Assizes or Sessions, and then traverse the indictment, and that he shall surrender and take his trial at such second Assizes or Sessions, unless such accused party shall, before he enter into such recognizance, choose and consent to take his trial

at such first Assizes or Sessions, in which case the recognizance may be in the ordinary form hereinbefore mentioned. (See "Bail," p. 32).

XXIV. *When Justice admits a person to bail after commitment a writ of deliverance shall be sent to him, if not detained for any other offence*.—That in all cases where a Justice or Justices of the Peace shall admit to bail any person who shall then be in any prison charged with the offence for which he shall be so admitted to bail, such Justice or Justices shall send to or cause to be lodged with the keeper of such prison a warrant of deliverance (S. 5.) under his or their hand and seal or hands and seals, requiring the said keeper to discharge the person so admitted to bail, if he be detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper he shall forthwith obey the same. (See "Bail," p. 32).

XXV. *If after hearing evidence against the accused it is not thought sufficient to warrant commitment he shall be discharged; but if evidence considered sufficient, Justice shall, by warrant, commit the accused for trial*.—That when all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the Justice or Justices of the Peace then present shall be of opinion that it is not sufficient to put such accused party upon his trial for an indictable offence, such Justice or Justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such Justice or Justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such Justice or Justices shall, by his or their warrant (T. 1.) commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place to which by law he may now be committed, or, in the case of an indictable offence committed on the high seas, or on land beyond the sea, to the common gaol of the county, riding, division, liberty, city, borough, or place within which such Justice or Justices shall have jurisdiction, to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as hereinbefore mentioned.

XXVI. *Regulations for conveying prisoners to gaol.—As to payment of costs for conveying prisoners to prison*.—That the constable or any of the constables or other persons to whom the said warrant of commitment shall be directed shall convey such accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with such warrant, to the gaoler, keeper, or governor of such gaol or prison, who shall thereupon give such constable or other person so delivering such prisoner into his custody a receipt (T. 2.) for such prisoner, setting forth the state and condition in which such prisoner was when he was delivered into the custody of such gaoler, keeper, or governor; and in all cases where such constable or other person shall be entitled to his costs or expenses for conveying such person to such prison as aforesaid it shall be lawful for the Justice or Justices who shall have committed the accused party, or for any Justice of the Peace in and for the said county, riding, division, or other place of exclusive jurisdiction, wherein the offence is alleged in the said warrant to have been committed, to ascertain the sum which ought to be paid to such constable or other person for

conveying such prisoner to such gaol or prison, and also the sum which should reasonably be allowed him for his expenses in returning, and thereupon such Justice shall make an order (T. 2.) upon the Treasurer of such county, riding, division, liberty, or place of exclusive jurisdiction, or if such place of exclusive jurisdiction shall be contributory to the county rate of any county, riding, or division, then upon the Treasurer of such county, riding, or division, respectively, or, in the county of Middlesex, upon the Overseers of the poor of the parish or place within which the offence is alleged to have been committed, for payment to such constable or other person of the sums so ascertained to be payable to him in that behalf; and the said Treasurer or Overseers, upon such order being produced to him or them respectively, shall pay the amount thereof to such constable or other person producing the same, or to any person who shall present the same to him or them for payment: Provided nevertheless, that if it shall appear to the Justice or Justices by whom any such warrant of commitment against such prisoner shall be granted as aforesaid that such prisoner hath money sufficient to pay the expenses, or some part thereof, of conveying him to such gaol or prison, it shall be lawful for such Justice or Justices, in his or their discretion, to order such money or a sufficient part thereof to be applied to such purpose.

XXVII. *After examinations are completed, defendant entitled to copies of the depositions*.—That at any time after all the examinations aforesaid shall have been completed, and before the first day of the Assizes or Sessions or other first sitting of the Court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three half-pence for each folio of ninety words. (See s. 3 of 14 Vic., No. 43, post).

XXVIII. *Forms in Schedule deemed valid*.—That the several Forms in the Schedule to this Act contained, or Forms to the same or the like effect, shall be deemed good, valid, and sufficient in law. (The authorized Forms will be found in Part II.)

XXIX. *Metropolitan Police Magistrates and Stipendiary Magistrates in other places may act alone*.—Nothing to affect powers, &c., contained in 10 G. IV., c. 44, 2 & 3 Vict., c. 47, 2 & 3 Vict., c. 71, and 3 & 4 Vict., c. 84.

XXX. *Lord Mayor, or any Alderman of London, may act alone*.—Nothing to affect powers, &c., contained in 2 & 3 Vict., c. 94.

XXXI. *Chief Magistrate of Bow-street may be a Justice for Berks, without qualification*.

XXXII. *Act to extend to Berwick-upon-Tweed, but not to Scotland, Ireland, &c., except as to backing of warrants*.

XXXIII. *Commencement of Act*.

XXXIV. *After commencement of this Act the following Acts and parts of Acts repealed*:—13 G. III., c. 31; 28 G. III., c. 49; *44 G. III., c. 92; *45 G. III., c. 92; 54 G. III., c. 186; 1 & 2 G. IV., c. 63; *3 G. IV., c. 46; *7 G. IV., c. 38; *7 G. IV., c. 64; *5 & 6 W. IV., c. 33; *6 & 7 W. IV., c. 114; "and all other Act or Acts, or parts of Acts, which are

inconsistent with the provisions of this Act, save and except so much of the said several Acts as repeal any other Act or parts of Acts, &c." (w)

SUMMARY.

(11 & 12 VIC., c. 42).

INDICTABLE OFFENCES.

Preliminary Procedure in Indictable Offences].—The first Act adopted (11 & 12 Vic., c. 42) relates to the Law and Practice of procedure before Justices of the Peace out of Quarter Sessions with respect to indictable offences, and the examination and committal of accused persons for trial; and, as regulated thereby, will now be considered such portions of the Magistrates' duties as involve proceedings "of most frequent occurrence, or of paramount importance."

With respect to the apprehension of offenders, the first fifteen sections have all reference thereto; but it is proposed only to dwell upon those which relate to charges made before the Magistrate himself, who is required to issue a warrant or summons in respect thereof.

What to be considered before issuing Warrant or Summons on charge preferred].—By the first section the Justice is empowered to issue either a warrant or summons in all cases where complaint is made before him "that any person has committed, or is suspected to have committed, any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever." Whenever, then, a complaint of the above-mentioned description is made before him, he should, in the first instance, assure himself that it has some foundation in fact, and that it amounts also to an indictable offence in law. For, notwithstanding the maxim that everyone is presumed to know the law, it is every day's experience that the majority are very ignorant of its provisions, and the consequence is, that individuals are frequently brought to a police office, or handed over to a constable, to answer for acts for which they are amenable only to a Court of Civil Judicature. The Magistrate, therefore, will do well to require from parties making charges a definite statement of their complaint,—not necessarily a minute and circumstantial detail of every particular, but at least such a clear account of the matter as to satisfy him, first, that, in point of law, an indictable offence is imputed; and, secondly, that, in point of fact, the offence charged has been—or that there is strong reason for suspecting that it has been—actually committed.

Mode of proceeding in granting warrant or summons].—Having heard the charge preferred, he will exercise his discretion in granting a warrant or summons. (x) If he adopt the former, he will find, from the 8th sec-

(w) The Acts to which asterisks are prefixed are only partially repealed.

(x) *Sealing Proceedings*].—With regard to sealing by the Magistrate, it may be remarked that the seal, or mark intended as a seal, on summonses, warrants, &c., may be any impression or otherwise in ink, made at the time by the clerk, or by the printer, and adopted by the Justice signing the document. See *R. v. St. Paul's, Covent Garden*, 14 L. J. M. C., 109.

tion, that he cannot do so until the charge has been reduced to writing, and verified on oath. As to the manner in which this and other matters directed by the Act should be done, a guide is furnished to him in the various Forms appended to the Act, "which Forms," or "Forms to the same or like effect," the 28th section declares, "shall be deemed good, valid, and sufficient in law." This, however, does not proscribe the use or impair the validity of any other Forms; but it will be better, nevertheless, where it can be done, to follow those given by the Act. (Y)

To render more intelligible the preceding directions by a suppositious case, let it be imagined that *John Smith* gives information to a Justice that his watch has been stolen from him by *Thomas Jones*. *Smith* should be required to state, verbally, the circumstances of the theft: the time and place when and where his watch was lost,—when he first missed it,—how he knows it was stolen,—and how he has ascertained, or why he suspects, *Jones* to have stolen it. If he answer these questions satisfactorily, the charge founded on his statement may then be reduced to writing, and, after he has sworn to a belief of its truth, a warrant may be issued. The Justice will remark the words "*charge founded on his statement*"; for it is not necessary to take down the statement itself for the purposes of a warrant. It is advisable to obtain such statement, in order that the Magistrate may ascertain whether the circumstances of the case be such as to justify a warrant instead of a summons; but the facts which he has thereby elicited as a guide for his discretion, need not be incorporated in the warrant, if he be determined upon issuing one.

Smith then, having satisfied him that he (*Smith*) has good grounds for accusing *Jones* of having stolen his watch, the charge may be taken down as follows:—

Form of Information on charge of Larceny.

New South Wales }
 To wit. } The information and complaint of John Smith, of Sydney, in the Colony of New South Wales, (labourer), taken this day of _____, in the year of our Lord 186____, before the undersigned A. B., one of (or, if more than one, before us) Her Majesty's Justices of the Peace in and for the Territory of New South Wales, who saith that Thomas Jones, (or, if he did not see Jones take the watch, that he hath just cause to believe and suspect, and doth believe and suspect, that Thomas Jones), of _____ in the said Colony, labourer, did, on or about the day of _____ last, at _____ in the Colony aforesaid, feloniously steal, take, and carry away one silver watch, the property of the said John Smith.

—This should be signed by *Smith*, and an oath, in the following words, should then be administered to him:—

Oath on taking information].—"You, John Smith, do swear that the contents of this your information, signed by you, are true and correct, to the best of your knowledge and belief. So help you God."

(Y) By the 7th section of the 14th Vic., No. 43, the Forms may be varied in the manner therein provided, and published, when complete, in the *Gazette*. This has been done, and the Forms hereinafter given (Part II.) and referred to were adapted by the Justices assembled in General Quarter Sessions at Sydney, in June, 1861.

Justice's Attestation].—The Justice will then add his attestation thus :—

“ Sworn before me the day and year first above mentioned, at
in the Colony aforesaid.

“ J. P.”

Search Warrant should be issued in certain cases].—The information having been duly signed and sworn to by the prosecutor, it may become a matter of importance in some cases, as in cases of larceny, to consider whether a *warrant of apprehension* should be issued against the offender's person, or whether it would not be expedient to issue a *search warrant*, for the purpose of examining his house and premises, and thus strengthen the evidence by the actual finding therein of the stolen property. It may be granted by *one* Justice, on information on *oath* by the owner of the goods stolen, or some one on his behalf, of reasonable ground for suspecting that such goods are in the house or on the premises of any particular person. Persons must be guided by circumstances in their selection of one or other of these modes of proceeding. A Form of search warrant will be found in Part II.

The search warrant for stolen property must be executed in the day-time, if there be probable suspicion only ; but where there is positive proof, it may be executed in the night-time, and may, it is conceived, be executed on a Sunday. Other articles than those mentioned in the warrant may be seized, if they are likely to furnish evidence of the identity of those which are specified. (*Crozier v. Cundy*, 6 B. & C., 232).

The next step is granting the warrant, which may be in the Form given in the Schedule (B.) The direction may, to quote from Nichols, “ either be to the constable by name, or, *generally*, to the constable of the place or district within which it is to be executed, or to such constable of the district, &c.”

Mode of stating the offence in warrant].—The “ offence charged,” as to time, place, and description, may in all cases be in the same terms as those employed in the information or complaint, if they be there properly stated ; but care must be taken that the charge sufficiently appears on the warrant to authorize the constable's putting it in force ; as, otherwise, in the event of resistance, he would be unable legally to oppose force by force. Not unfrequently warrants have been issued, in which the party apprehended thereon was charged simply with “ felony,” which amounts, in law, to no charge at all. The particular offence should always be specified, and in such terms as to leave no doubt that a felony or indictable offence is charged. Proper descriptions of the most common offences are to be found in Part II.

Proceedings by Summons].—Thus far it has been presumed that a warrant has been granted by the Justice ; but as, in the exercise of his *discretion*, he might see fit only to issue a summons, the mode of proceeding in the latter case will have to be considered.

It is provided by the 8th section, “ *that in all cases where it is intended to issue a summons instead of a warrant in the first instance, it shall not be necessary that such information and complaint shall be in writing, or be sworn to or affirmed in manner aforesaid, but in every such case such information and complaint may be by parol merely, and without any oath*

or affirmation whatsoever to support or substantiate the same." This does not prohibit the taking of an information in writing and on oath, but merely dispenses with its necessity where the Justice determines only to issue a summons.

Precautionary Suggestions].—There might be cases, however, in which even before issuing a summons, he would do well to require of the informant something more than his mere verbal statement; and the consequences are so serious to any man, whether as regards his character or his pocket, of being called on to answer a criminal charge, that no one would blame a Magistrate for receiving with great care and caution statements which, even under the restraint of an oath, are, from the lips of an *interested* and excited accuser, not always to be depended on.

Assuming that a summons is granted, the Form given in the Schedule to the Act (C.) should be followed. The mode of service is pointed out in the 9th section, which enacts, "*That it shall be served by a constable or other peace officer upon the person to whom it is directed, by delivering the same to the party personally, or if he cannot conveniently be met with, then by leaving the same with some person for him, at his last or most usual place of abode, and the constable or other peace officer who shall have served the same in manner aforesaid, shall attend at the time and place and before the Justices in the said summons mentioned, to depose, if necessary, to the service of such summons.*" If the party summoned does not attend at the time specified, the Justice may issue a warrant for his apprehension, which warrant may be according to the Form in the Schedule of the Act (D.)

Proceedings to be taken in granting warrant if summons disobeyed].—Before granting the warrant, however, the deposition of the constable, on oath, must be taken of the service of the summons; to render which effectual, the Justice should, on issuing the summons, cause a copy of it to be made out and compared with the original *by the constable who is to serve it*; for it will be observed that the Act directs that the service of the summons shall be both made and deposed to by the constable to whom it is delivered. This would seem to render it necessary that the constable should be able to read, for it does not very easily suggest itself how he could make himself acquainted with the contents of the summons, except by comparison with the copy. Assuming that he is able to read, and has examined the copy and original together, the following Form will answer for his deposition:—

New South Wales }	
To wit. }	The deposition of J. N., constable, of _____ in the
	said Colony, taken upon oath before me the undersigned, one of Her Majesty's
	Justices of the Peace for the said Colony, this _____ day of _____
	185 _____, who saith that he served A. B., mentioned in the annexed within sum-
	mons, with a duplicate thereof, on the _____ day of _____ last,
	personally, (or by leaving the same with N. O. at the said A. B.'s usual place
	of abode at N. in the said Colony).
	Before me, _____ J. S.

Before the deposition is made, the copy of the summons referred to should be attached to the deposition by a tape and sealing-wax, and the Justice before whom it is taken should endorse on the copy of the summons

these words, "This is the copy of the summons referred to in the deposition of (constable) hereto annexed," adding his signature, as well as to the deposition itself.

Suggested mode of verifying service of summons where constable serving it unable to read.—If the constable to whom the summons is delivered cannot read, (which is not at all an improbable supposition), some means must be contrived for verifying the service in another way than through the medium of the constable's perusal and comparison. All that he can swear to in such case is the fact of having left with the party served a certain piece of paper handed to him by a certain person; but of its contents he can affirm, of his own knowledge, nothing. It will be necessary, therefore, for some other person (say the Clerk of the Bench) to ascertain by his own comparison that a correct copy has been made of the original summons before the latter is delivered to the constable employed to serve it. Having made such copy, and compared it with the summons, the party making it should take it into his own charge, and deliver *with his own hand* to the constable the original, explaining at the same time to him its contents. He should then endorse on the copy the following memorandum :—

"Delivered to constable (*name*) the original of this copy, on (*day of week*) the day of , 185 , at about o'clock a. m. (or p. m.), having previously compared the original and copy, and explained to the said (*constable*) the contents of the former, and named the party upon whom it was to be served.

"Signed,

"J. S."

This particularity will enable him to make the deposition hereinafter suggested, should the party served not attend, and a warrant be required to apprehend him. The deposition may be a joint one with the constable, and may be in the following form :—

New South Wales }

To wit. } The joint and several deposition of , Clerk of the Bench, &c., at , in the said Colony, and of , constable, of , in the said Colony, taken upon oath before me the undersigned, one &c., this day of , 185 , of whom the first named deponent for himself saith that he did on the day of , at about o'clock , at in the said Colony, deliver to the above-named (*constable*) the original summons of which the paper writing hereto annexed purports to be a copy, and at the same time explained to him the contents thereof, and mentioned to him the name of (*the party named in the summons*) as the party to be served therewith. And the said further saith that previously to delivering the said original summons to the said (*constable*) he compared and examined it with the said paper writing hereto annexed, and found it to be a true and correct copy thereof, and that the same paper writing is now in the same state as it was when the said so examined it as aforesaid, and is, to the best of his belief, a true and accurate copy of the said original summons. And the deponent the said (*constable*) for himself saith that on or about the day of he the said (*constable*) received from the hands of the said (*Clerk of Bench*) the first-named deponent, a paper writing, which the said (*Clerk of Bench*) explained to him the said (*constable*) to be a summons commanding one (*party served*) to appear before (*Justice's name*) on the day of at o'clock in the forenoon, or before such other Justice or Justices as should be then and there, to answer the charge

mentioned in the said summons. And the said summons so delivered to him by the said (*Clerk of Bench*) as aforesaid, he served personally on the said (*party served*) mentioned in the said summons, or by leaving the same with at the said 's most usual (or last) place of abode at , in the said Colony.

Signatures { (*Constable*).
 { (*Clerk of Bench*).
Before me, J. S. (*Justice's signature*).

This affidavit will fully authorize the Justice in granting his warrant to apprehend the party served, in case of his non-attendance. Care should be taken that sufficient time be allowed for the service of the summons and the appearance of the party served, by inserting a day not too near at hand; and on the day named for the appearance of the party to be served, the constable employed to serve it should be in attendance, to prove, if necessary, the service; for no warrant can be granted without such proof by him. See 9th section.

It remains to be observed that, by the latter part of the 1st section of the Act, the Justice may, if he think fit, issue his warrant before the time fixed for the return of the summons; circumstances might render such a course expedient, but in that case an information in writing, and on oath, must be previously taken; as to which, and the warrant by which it is to be followed, the directions previously given will equally apply.

Warrant may be executed on a Sunday.—If it be added that the warrant may be executed on a Sunday, the Magistrate will, it is hoped, have gathered from what has been already said on this preliminary stage of his ministerial duties, sufficient information. See *Rawlings v. Ellis*, 16 M. & W., 172.

Hearing. (z)—Withdrawal of charge when before Justices.—Justices have no power to permit the withdrawal of a criminal charge, for if a *prima facie* case is made out against the prisoner by witnesses entitled to a reasonable degree of credit, they have no discretion whether or not they will commit the accused for trial; but, if the prosecutor do not offer any evidence, it is presumed the Justices may discharge the accused, and such is the practice of the higher Courts.

Hearing of charge may be public or private.—The party accused having appeared to answer the charge against him, and the witnesses being in attendance to give evidence, the Magistrates are at liberty to determine, if they think fit, that the examination shall be conducted in private. This power is conferred on them by the 19th section, and, although it is one which should be sparingly used, there will be occasions when, not merely the particular features of the crime itself, but the peculiar circumstances of the times in which it is perpetrated, render it desirable that such a power should not be overlooked. It is recommended, however, that in all such cases the attorney of the accused, if one be employed, should be permitted to be present at the examination, in order that he might have the opportunity of cross-examining the witnesses; for it is to be borne in mind that, under a provision to that effect in the Act, the depositions of witnesses taken before the committing Magistrates may,

(z) Justices cannot proceed to hear a charge of an indictable offence in the absence of the accused, even though he be represented by counsel or attorney.

upon the death of such witnesses, or their inability, through illness, to attend the trial, be read in evidence against the accused. A pledge, in such cases, should be required of the attorney not to publish the result of the examination, in the event of his violating which, the Magistrates might decline to allow his attendance in any future criminal case. (A)

Proceedings to be observed in hearing the charge.—The hearing of the charge, whether public or private, is to be conducted according to the provisions of the 17th section, which enacts, in substance,—

1st. That the accused party is not to be admitted to bail, or committed for trial, until “a statement has been taken, on oath or affirmation, of those *who shall know the facts and circumstances of the case.*”

2nd. That such statement shall be *in the presence of the accused*, who shall be at liberty to put questions to any witness produced against him.

3rd. That, *before any evidence is given by any witness, the Justice before whom he shall appear* shall administer to him the usual oath or affirmation.

4th. That, after the witness has given his evidence, his deposition shall be read over and signed by him, and shall be signed also by the Justice or Justices before whom such deposition is taken.

From the above it will be seen that a particular course of proceeding is prescribed, which is somewhat at variance with the former practice. In the first place, no previous statements or information, even though on oath, should be adopted *as evidence* against the accused; but the deponent should be *sworn again, and his statement then given be reduced to writing from his own lips in the presence of the prisoner*, as well as that of the other witnesses to be examined in support of the charge. The person taking down the evidence should have at hand a Form similar to that given in the Schedule (M.), which should be filled up with the names of the witnesses in attendance, and a statement of the charge in respect to which they are about to be examined. This is called the *caption* of the depositions, and, when once stated, need not be repeated; but the depositions of all witnesses whose names are not mentioned in the caption must show, by the heading of them, that they are taken in reference to the charge mentioned in the caption; otherwise, they will be inadmissible at the trial, should they be tendered as evidence under the provisions of the 17th section.

Caption.—With respect to the mode of entitling the depositions, one

(A) Where a Magistrate is acting merely in a *ministerial* capacity, as inquiring into a charge of felony previous to a committal of the party for trial, a prisoner is not entitled *as of right* to have a person skilled in law present at the investigation, to act on his behalf; the Magistrates may allow the presence of advocates for the accused where doubts arise on matters of law, respecting which they may wish to have legal assistance; but it may be essential to the ends of justice, and more especially to prevent the escape of accomplices, that the inquiry should be private. The presence of an attorney on such occasions is permitted as a matter of courtesy; his assistance is sometimes desired, and, if his advice and opinion are asked, it is proper for him to give them; but he has no right, uninvited, to make comments on the evidence. If the accused be innocent, he will be able to suggest to the Magistrate all such matters as may tend to elucidate the truth. (*Cox v. Coleridge*, 1 B. & C., 37; *R. v. Borron*, 3 B. & A., 432).

caption at the head of the whole body of depositions will suffice; (*R. v. Johnson*, 2 C & K., 355); if indeed it be necessary, in strict law, to have a caption at all; (*R. v. Langbridge*, 1 Den., 448); and no objection can be sustained on the ground that the title does not state with sufficient precision the charge against the accused. (*Id.*) The following very recent decision shows how the objects of justice may be frustrated by carelessness in this respect:—C. D., having had a rape committed upon her by the two prisoners, next day, in distress of mind, cut her throat; and, being likely to die, a Magistrate was sent for, and, in the presence of the prisoners, her deposition was properly taken; she was told she was likely to die, and she died a few days afterwards. Subsequently, other witnesses gave evidence against the prisoners before a different Magistrate, and to these latter depositions the deposition of the deceased was attached without any separate caption: It was held by Hill, J., that the deposition of the deceased, having no caption showing on what charge it was taken, was inadmissible as evidence; nor was it admissible as a dying declaration, as it did not relate to the offence which caused the death. (*R. v. Newton*, 1 Fost & F., 641).

The caption of the depositions having been written out, the first witness to be examined should be sworn, and it would seem, from the words of the Act, should be sworn *by the Justice himself*. No information need be taken, or, if previously taken, again sworn to, the charge sufficiently appearing from its statement in the caption, as to which the evidence is to be taken, irrespective of the information on oath on which a warrant may have been granted. The deposition of a witness mentioned in the caption may commence as in the Form, "This deponent, C. D., on his oath saith as follows," and should be continued by the statement of the witness in, as near as possible, the very words in which it is detailed. The Act evidently contemplates that it should be taken down in the first person; and indeed, before the passing of the Act, this course was always recommended by the English Judges as the proper one to be pursued. It is not necessary that *everything* which a witness says should be taken down; but whatever is taken down should be stated, as far as possible, in his own words. No attempt should be made to abbreviate his statement, by giving what may be conceived to be its purport or substance; neither should the witnesses themselves be allowed to state their own conclusions from facts, instead of the facts themselves from which the conclusions may be drawn. If, for instance, a constable say, "*When I apprehended the prisoner, I told him why, and he confessed the charge,*" he should be desired to repeat *the exact conversation* which took place between him and the prisoner; and such conversation only, and not the constable's summary of it, as above supposed, should be taken down. On the same principle, when such expressions as "*he denied it,*" "*he concealed it,*" "*he prevaricated,*" "*he refused,*" and similar assumptive assertions, are used by a witness, he should be requested to explain the particular circumstances,—to state the *facts* or *words* which amount in his own mind to the denial, concealment, prevarication, or refusal to which he swears.

A witness should also be stopped in repeating *hearsay*, or anything that was told him by others, if it was not in the presence and hearing of the accused person. Witnesses undoubtedly *will* frequently mix up their testi-

mony with hearsay, and in such cases it may be difficult to extract their statement exactly as given; but still the effort should be made; and, if they persist in recapitulating the hearsay in such a manner as to make it impossible to disentangle it from the other portion of their evidence, without making a statement *for*, instead of receiving one *from*, them, the whole had better be taken down. In such cases, however, the hearsay evidence ought not to affect the Justice's decision on the charge. See, *ante*, "Evidence."

Another ingredient in the deposition, which it will be well to observe, is the addition or description of the deponent. When the name of the witness has been given, the Justice should ask him his calling or vocation, for so apparently trifling a matter furnishes a key sometimes to the evidence of the witness, without which it might not be so significant or intelligible. And the Justice should always bear in mind that the deposition he is taking is to go before the Attorney-General, or a Crown Prosecutor, who, in deciding on the prosecution or discharge of a party committed for trial, should be able to see on the face of the deposition, not only what the witnesses have said, but who they are, or what they profess to be. Indeed, every circumstance detailed by the witness should be taken down with great care and accuracy, particularly as regards time, place, and persons, whenever named; and whenever these or any other matters appear to be loosely or ambiguously spoken of, the Justice should call the attention of the witness to these points,—not by leading questions, but by such as tend to elicit the desired information from the witness himself, in his own words. Should the accused interpose an observation during the examination of a witness, (B) it may be inserted in this manner,—“The prisoner here voluntarily says,” &c.,—*putting his very words*. All this may seem of little consequence to the Justice at the moment, but in the subsequent proceedings, to which the Legislature had especial view, probably, in providing for the preliminary ones, any deviation from the prescribed mode may be productive of very mischievous consequences. Previous to the passing of Jervis's Acts, Baron Parke thus expressed himself in reference to a case before him:—“Magistrates are required by law to put down the evidence of witnesses, or so much thereof as shall be material. They have hitherto, in many cases, confined themselves to what they deemed material; but in future it will be desirable that they should be extremely careful in preparing depositions, and should make a full statement of all the witnesses say upon the matter in question, as the experience we have already had of the operation of the *Prisoner's Counsel Bill* has shown us how much time is occupied in endeavouring to establish contradictions between the testimony of witnesses and their depositions, in the omission of minute circumstances in their statements made before the Magistrates, as well as other particulars.”

No one can have attended the Courts in this Colony without perceiving how much time is frequently occupied, in criminal cases, in the same

(B) *R. v. Stripp* (25 L. J. M. C., 109) decides that no caution is necessary by the Magistrate till the depositions are all taken, and the case for the prosecution completed; and even if such observation be not so taken down, parol evidence of it will be allowed to be given at the trial. (*Id.*, 25 L. J. M. C., 109; *R. v. Bond*, 3 C. & K., 337; 1 Taylor Ev., 719).

manner as that described by the learned Baron. It need hardly be pointed out that the care and exactness recommended by him to the Magistrates in the taking of depositions, have become matter of still greater necessity in consequence of the possibility, under the circumstances before mentioned, of the depositions themselves being receivable as evidence against the accused.

Depositions].—If a person of weak intellect, or a child, be examined, it is very desirable that the questions and answers touching his capacity to take an oath should appear on the face of the deposition. (*R. v. Painter*, 2 C. & K., 319, per Wilde, C. J.)

After each witness has concluded his deposition, it is to be read over to him, and signed both by himself and the Magistrate before whom it is taken; but whether the deposition is to be signed before or after cross-examination by the accused, or both before and after, if any cross-examination takes place, it is not very easy to ascertain from the language of the 17th section. (c) The safe way would seem to be, after the examination-in-chief has been concluded, to read it over to the witness, and let him sign it, and then to ask the accused whether he wishes to put any questions. If he does not, the Magistrate also can at once sign the deposition; if he does, the following entry may be made:—"The above-named witness, A. B., was cross-examined as follows by the above-named C. D., the accused;" or, "by Mr. E. F., the attorney of the above-named C. D., the accused." If the accused himself cross-examine the witness, the questions as well as answers should be taken down; but if the answers have clearly no bearing upon the charge, they need not be taken down. After the cross-examination is finished, it should be read over to, and signed by, the witness, after which the Magistrate may append his signature to the following attestation:—"The above deposition and cross-examination of the witness A. B. were respectively taken and sworn before me, at _____ on the day and year first above mentioned.—(Signature) J. S."

The course just suggested may, in the language of the lawyers, be considered, perhaps, as one suggested *ex abundanti cautela*, rather than one rendered obligatory by the terms of the statute. The following extract, however, from Saunders's edition of Jervis's Acts will show that the construction is not a singular one, which has led to the recommendation of the course proposed:—"Although power is given to the accused to cross-examine, there is no provision expressly requiring the Justice to take down as part of the depositions such cross-examinations, and hitherto, in practice, it has not been usual to take it. When, however, it is remembered that on the death, or inability, through illness, to travel, of the witness, his deposition, which may involve the life of the accused, may be given in evidence, every consideration of justice and humanity requires that the prisoner's cross-examination should be carefully taken and returned as a portion of the depositions. Indeed, the latter part of this clause (the 17th) appears to point to the depositions containing also the cross-examination; for it also makes the depositions, in the case suggested, receivable

(c) It is hardly necessary to remark that Magistrates ought not, on any account, to sign depositions which have not been taken before them.

as evidence only on proof that the accused, his counsel, or attorney, had a full opportunity of cross-examining the witness; and it would be idle to cross-examine, or make the power to do so a condition for the reception of the depositions, if they need not contain the cross-examination itself. It may therefore be safely laid down, that although the Legislature has not so expressly enacted, yet it was obviously its intention that the depositions should contain the cross-examinations where any in fact have taken place."

There is much force in the reasons for this construction, and whether it be the true legal one or not, it will, at all events, be the safer one to adopt.

It seems that the signature of the Justice must appear on the face of the deposition to be that of the Magistrate "by or before whom the same purports to have been taken," and that no parol evidence will be received to supply any omission on this head. (*R. v. Miller*, 5 Cox C. C., 166, per Maule J.)

It has been already stated that, although an information on oath has been taken for the purpose of bringing the accused before the Police Court, the informant ought, nevertheless, to be examined as a witness, and his evidence then given taken down on the hearing of the charge. It will not be sufficient even to swear the informant afresh, and read over to him the contents of his information; for the accused has a right to hear all evidence used against him, given *step by step*, and is to be asked, in reference to the evidence *so given*, whether he wishes to put any questions to the witness. Care also should be taken that he is not asked, once for all, whether he wishes to ask *the witnesses* any questions after all have been examined; but at the close of the examination of each witness, he should be asked in reference to them severally, whether he has any questions to put. *R. v. Day*, (19 L. T., No. 471, S. C. 6 Cox C. C., 55), has shown the necessity of attending to these points. It was proposed to read the depositions of the prosecutrix, and proof having been given that she was unable to attend through illness, the counsel for the prosecution called upon the officer of the Court to read the deposition. Upon this, the Judge, Baron Platt, observed:—"Something further is necessary. You must show that the deposition was taken conformably with the statute." The report then continues as follows:—"The Magistrate's clerk was called. He stated, "that the prisoner was present with her father when the deposition of the prosecutrix was taken. The Magistrate asked the prisoner whether she had any questions to put; but there was a little uncertainty in the evidence of this witness, whether she was so asked with reference to *the particular examination* of the prosecutrix, or whether it was a general question at the end of the examination of another witness. A police officer was then examined. He was a witness on the same occasion. He could not recollect whether the prisoner was asked if she had any questions to put to the prosecutrix; but he disclosed the fact, that the examinations of the witnesses were taken and committed to writing by the clerk previously to the arrival of the Magistrate; that they were then read over in the presence and hearing of all parties, and that it was then, if at all, that the prisoner was asked if she had any questions to put to the prosecutrix."

On this state of facts, it was submitted on behalf of the Crown, that

the statute has been sufficiently complied with, if the deposition appeared *on the face of it* to be regularly taken; but Baron Platt held otherwise. "It was," he said, "the duty of the Magistrate to ask the prisoner if she had any questions to put, and it must be proved that he did so, and did so with reference to the examination of the particular witness. Until she was asked, I am of opinion she had no opportunity of cross-examination within the meaning of the statute, and the evidence is not satisfactory on that point. But on another ground, the prisoner had not an opportunity of cross-examination. The examination of the witness being taken down and put into writing before the arrival of the Magistrate, the *reading it over in his presence could not give the prisoner a proper opportunity of cross-examination*. She had a right to hear the evidence given *step by step*, and so have time to consider what questions to put. I cannot allow the depositions to be read."

The evidence for the prosecution and cross-examination therein (if any) having been brought to an end, the Justices will, if there be no further evidence to be called on the part of the prosecution, consider whether they should take bail or commit the accused. (D) If they are of opinion that the evidence is not sufficient for either purpose, they may, by the 25th section, order him to be discharged forthwith. Should they think it sufficient, it will be necessary for them to address to the accused the caution prescribed by the 18th section; and it is suggested by Mr. Oke, in his *Magisterial Synopsis*, that "unless there is a *prima facie* case against the accused, this caution had better not be read to him." At all events, there can be no necessity for such a course; for the accused is not to be called on with a view of substantiating a charge against himself, but of making a statement, if he pleases, in reply to a charge already, *prima facie*, substituted.

Assuming, however, that a *prima facie* case has been made out by the evidence for the prosecution, the Justices may, if they think fit, on such evidence alone, commit the accused for trial, or admit him to bail. They must, however, previously, "*read, or cause to be read, to the accused the depositions taken against him,*" and shall say to him—"The words contained in the 18th section, usually called 'The Caution,' and whatever he then says in answer thereto, *is to be taken down in writing, and shall be signed by the Justice or Justices, and kept with the depositions of the witnesses, and shall be transmitted with them to the Attorney-General.*" (14 Vic., No. 43, s. 2).

Let it be observed here, that not only is the deposition of each witness to be read over to him after he has given his evidence, but the whole of the depositions, when completed, are to be read over to the accused; otherwise, any statement which he may make in answer to the caution, cannot be given in evidence against him. It seems also that the Justices, or one of them, before whom the charge is heard, must put the question prescribed by the 18th section, and consequently, that if it be put by the Clerk of the Bench, the statement will be rendered inadmissible.

(D) Bayley, J., (1 B. & C., 50), observes: "I think that a Magistrate is clearly bound, in the exercise of a sound discretion, not to commit anyone, unless a *prima facie* case is made out against him by witnesses entitled to a reasonable degree of credit."

In addressing the accused in the terms of the caution in the first part of the 18th section, it will be desirable also, *at the same time*, to address him in the terms of the proviso enjoined by the latter part of the same section. The enactment in this proviso is not *mandatory*, (*R. v. Bond*, 19 L. J., M. C. 138), but simply *directory*, and is only efficacious where any inducement or threat may have been held out to the accused previously to his being brought before the Magistrate, in which case, if proved at the trial, it would render his statement, if an answer to the first part of the caution only, inadmissible. It would be therefore advisable to have, in addition to the first part given in the Forms in the Schedule to the Act, (E) the second part, or proviso, also printed in the Forms used by the Magistrate. The addition might be as follows:—"And you are also clearly to understand, that you have nothing to hope from any promise of favor, and nothing to fear from any threat, which may have been holden out to you to induce you to make any admission or confession of your guilt; but whatever you shall now say may be given in evidence against you upon the trial, notwithstanding such promise or threat." This course was recommended by Mr. Justice Coleridge, at the Cornwall Assizes, in July, 1850, in his charge to the Grand Jury, and the adoption of it would certainly, as he observed, "prevent any difficulties when the case came on for trial." (And see Forms, *post*, Part II).

It is now of still greater importance that the Magistrates in this colony should attend to the advice of Mr. Justice Coleridge; for if it can be proved that any untrue representation, or any threat or promise whatever, has been held out to the prisoner, (by 22 Vic., No. 7, s. 11), no confession made *after* such promise will be received in evidence, unless it can be proved that the promise, &c., did not induce the confession. (See, *ante*, "Confession.") Thus the burden of proving the negative lies upon the party tendering the confession, and the necessity of giving the most comprehensive caution is very much increased. (F)

It is not unusual, and is permitted in the London Police Courts, for the attorney of the accused, at the close of the case for the prosecution, and before he is cautioned, to address the Bench on his behalf, pointing out the circumstances which in his judgment should lead them to dismiss the charge.

If the prisoner make any statement after this caution has been addressed to him, it should be taken down as nearly as possible in his very words; and if he be willing to sign it, it will be advisable to get his signature thereto, reading it over to him first. The Justice will then add his signature, as prescribed in that Form.

It is hardly necessary perhaps to observe, that the accused is not to be

(E) The caution is as follows:—"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial."

The prisoner ought not to be induced to say anything which he might suppose would be favorable to him; neither ought the Magistrate to dissuade a prisoner from confessing.

(F) So lately as March, 1860, this important point was raised at Maitland. See *Sydney Morning Herald*, March 16th.

sworn to the truth of his statement; and if by any mistake the Justice sign the words, "taken and *sworn before me*," the statement will be thereby rendered inadmissible, for evidence will not be received to show that, in point of fact, the accused was *not* sworn, and that the words "*and sworn*" had been inserted inadvertently. (*R. v. Rivers*, 7 C. & P., 177).

As has been already stated, the Magistrates may commit the accused for trial if they please, without hearing any evidence offered in his defence. The better course, however, and one apparently more in accordance with the spirit of the Act, would be, to hear the witnesses for the accused, as well as those for the prosecution. In the 17th section, the Magistrates are required to take the statement of "*those who shall know the facts and circumstances of the case*;" and this they can scarcely be said to have done, if they decline to hear *any witness* who is tendered for the purpose of deposing to such facts and circumstances. There are cases in which a charge, *prima facie* well founded, may, by other evidence, be totally rebutted; and to reject such evidence merely because offered on the part of the accused, appears to be neither reasonable nor just. Upon this subject, Lord Denman, in his charge to the jury at the Somerset Assizes, in the Spring Circuit of 1849, made the following observations:—"In all cases in which prisoners charged with felony have witnesses, and those witnesses are in attendance at the time of the examination before the Magistrate, I should recommend that the Magistrate should hear the evidence of such witnesses as the prisoner, on being asked, wishes to be examined in his defence. If such witnesses merely explain what has been proved in support of the charge, and are believed, they will actually have made out a defence on behalf of the accused, and there would, of course, be no necessity for any further proceedings; but if the witnesses so called *contradict those for the prosecution in material points*, then the case would be properly sent to a jury, to ascertain *the truth of the statements of each party*; and the depositions of the prisoner's witnesses being taken, and signed by them, should be transmitted to the Judge, together with the depositions in support of the charge."

Although no witnesses shall be in attendance on behalf of the accused, yet, if he refers to any person whose evidence might consistently with his own explanation exculpate him from the charge, such person should, if possible, be sent for and examined.

"If," to quote again (*R. v. Smith*, 2 C. & K., 208) the language of Lord Denman, "a person in whose possession property is found, give a reasonable account of how he came by it, and refer to some known person as the person from whom he received it, the Magistrate should send for that person and examine him, as it may be that his statement may entirely exonerate the accused person, and put an end to the charge; and it also very often may be that the person thus referred to would become a very important witness for the prosecution, by proving that, in addition to the prisoner's possession of the stolen property, he has been giving a false account as to how he came by it. I wish also to say that it is always very desirable that all that has been given in evidence before the Magistrate should be transmitted to the Judge."

The same accuracy and form should be observed in taking the evidence

of the witnesses examined on the part of the accused as that on the part of the prosecution; for, independently of other considerations, it is enacted by the 16th section of the Colonial Act, 14 Vic., No. 43, that the depositions of the witnesses for the accused may be read in evidence in his defence, if the witness should happen to die before the trial.

The order of the procedure in the preliminary inquiry may be given as follows:—

1. Prosecutor's Attorney opens the case.
2. Depositions of prosecutor's witnesses taken; at the end of each witness's examination-in-chief, such examination to be read over to, and signed by, the witness.
3. Accused invited at the close of each witness's examination-in-chief to put questions to the witness, such cross-examination being distinguished (see *supra*) in the deposition from the examination-in-chief. In the cross-examination, the questions, if relevant, as well as the answers, to be inserted in the depositions at the end of each witness's cross-examination; such examination to be read over to, and signed by, the witness; the Magistrate's attestation to be then appended. See *supra*.
4. Attorney for the accused to address the Bench if case for prosecution completed; or, if not completed and remand intended, to state his objection to his remand.
5. If evidence insufficient, accused discharged.
6. If evidence incomplete, accused remanded or bailed till a future day.
7. If evidence sufficient and case completed, depositions read over to the accused, and Magistrate's clerk to inform the accused of the precise legal charge against him.
8. Justice to caution accused as required by section 18.
9. Accused's statement to be taken down and read over to him.
10. Accused's witnesses, if any, heard, and their depositions taken.
11. If accused calls witnesses, prosecutor's attorney to cross-examine them.
12. Committal of accused for trial, or bailing, or consenting to bail him; if two or more charges preferred, one case to be completed, and the commitment held over until the completion of the other, and then a detainer made out in the second.
13. Binding over witnesses to prosecute.

Committal or Discharge].—If a committal be resolved on by the Magistrates, it will be their duty to bind over the witnesses to appear; that is, such witnesses as have given relevant and material evidence. (G)

(G) There seems to be no power in Jervis's Act to call upon a witness to find *sureties* for his or her appearance, whether he or she be an infant or not, or a married woman; and indeed an infant may enter into a recognizance, for infancy is no ground for discharging a recognizance. (13 Price, 679). As the husband is not liable if the recognizance of his wife is forfeited, the taking the recognizance of a married woman is altogether ineffective. Before the statute 11 & 12 Vic., c. 42, therefore, when any of the witnesses were minors or married women, it was usual to require the father or husband, or other competent person, to become bound for their appearance. If surety is taken for a witness, the bail may at any time surrender him, if they think he will not attend. (1 Hale's Sum., 96; 2 Hawk. P. C., c. 15, s. 3).

"It certainly," says Lord Denman, "cannot be necessary for a Magistrate to bind over *every witness* who is examined before him in support of a charge of felony, because it must often happen that some of the witnesses who are examined before the committing Magistrate really know nothing of the case, and, on inquiry, the whole of what they have to state may be hearsay only. The Magistrate is only to bind over those whose evidence is material to the case."

The commitment will be as in the Form T. 1.; and it would be advisable that the Magistrate should, for the guidance of the gaoler, direct the words "Quarter Sessions," or "Supreme Court," to be inserted in the margin of the commitment.

Where the accused is remanded, the caution required to be given by the Justices, in section 18, should not be given at the time of the remand, but should be deferred until "*after the examination of all the witnesses on the part of the prosecution.*"

Notwithstanding the warrant of remand having been made out for eight days, and the party accused committed to the gaoler's custody thereunder, the Justice may, nevertheless, before the expiration of eight days, order the accused to be again brought before him. This is a very convenient provision, particularly where the presence of witnesses can be procured earlier than anticipated. No Form of order is given in the Act in the case; but one will be found *post*, Part II.

Remanding Accused].—Should the Magistrates not commit for trial, on the ground of *absence of witnesses*, they are empowered by the 21st section of this Act, in consequence of such absence, "*or any other reasonable cause,*" to remand the accused from time to time, for a period not exceeding eight clear days; an expression which may either mean several remands, *each not exceeding eight days*; or several remands, not exceeding *the whole eight days*. The former was probably intended, and is, perhaps, the true sense in which it should be read. When the remand is for eight days, it must be by warrant, according to the Form (Q. 1.); if the remand be only for three days, it may be by verbal order; but in either case bail may be taken for the re-appearance of the prisoner, according to the Form (Q. 2.), accompanied by a notice to the accused and his sureties, according to the Form (Q. 3). On the accused being brought up for further examination after a remand, the proceedings should be commenced by reading over all the examinations and depositions previously taken, and the additional evidence is then gone into with the same formalities. In the event of his non-appearance at the appointed time, the recognizance may be transmitted to the Clerk of the Peace, to be proceeded upon as other recognizances, upon any Justice who may be present certifying the fact of the non-appearance of the defendant. (Sch. Q. 4).

Where the accused is committed for trial after he has been brought up on remand, the warrant of commitment should run thus:—

"To the Keeper of, &c., (*or constable*). Whereas A. B. was this day brought up by you, the Keeper of, &c., (*or constable*), and further charged before me, J. S., one of her Majesty's Justices, &c., for that, &c., (*stating shortly the offence*), and by me now here ordered to be committed for trial. These are therefore to command you, the said Keeper, (*or con-*

stable), to take back the said A. B. to the said (*House of Correction, or Gaol*), and there safely keep him in your custody until he shall be thence delivered by due course of law. Given under my hand and seal, this
 day of _____, in the year of our Lord _____ at
 in the Colony aforesaid.

(*Seal and Signature*) "J. S."

By s. 27, parties committed for trial, or bailed, are entitled, *after all the examinations have been completed*, to copies of the depositions, on payment of the fee fixed, from the officer or person having the custody of the same. On this subject, the 3rd section of 14 Vic., No. 43,—the Act adopting Jervis's Acts,—contains some further regulations.

If the accused, however, has been discharged by the Magistrate, or if, instead of being committed for trial, he has been committed to gaol until he should give sufficient sureties for keeping the peace, and for appearing at the Sessions or Assizes, to do what would be then enjoined by the Courts, he would not be entitled to copies. (*Ex parte Humphries*, 19 L. J. Q. B., 189; *R. v. Davies*, 1 L. M. & P., 323).

It remains only to call attention to ss. 16 and 20 of the Act under consideration to accomplish the object in view of this portion of the work; viz., an exposition of the duties of Justices under 11 & 12 Vic., c. 42, in matters of most ordinary occurrence, or of chief importance.

Compelling witnesses' attendance, and binding them over, &c.—By s. 16, a summons, in the Form (L. 1.) may be issued by any one Justice, on an oath being made that the person within the Justice's jurisdiction is likely to give material evidence *for the prosecution*. Service may be personal, or at the party's abode; if summons disobeyed, a warrant may be issued on proof of service, according to the Form (L. 2.); or, if a Justice is satisfied by oath that the witness will not attend without being compelled, a warrant in the first instance may be granted. On the appearance of the witness, and his refusal to be examined or to answer questions, he may be committed to prison for a period not exceeding seven days. A witness cannot refuse to attend, upon being served with a summons or subpœna, until his expenses are paid. A tender of his expenses is not necessary in indictable cases, as in summary convictions. Although the witness be not summoned, or apprehended on a warrant, he may be committed for refusing to be examined. (S. 16).

By s. 20, the Justice taking the examinations is to bind over (H) the prosecutor and the witnesses to appear and give evidence at the trial, by recognizance, according to Form (O. 1.), which must specify the trade, residence, &c., of the persons bound. Notice is at the same time to be given to the party bound in the Form (O. 2.) Witnesses refusing to enter into the same, may be committed until after the trial of accused by warrant in Form (P. 1.), unless recognizance sooner acknowledged. If

(H) In case the owner of goods, &c., should be unwilling to prosecute, the Justices may bind over the constable or other person to do so, and bind over the owner to give evidence, and commit the latter for refusing to enter into the recognizance; but a prosecutor only, who does not give evidence, cannot be committed under this section, nor, indeed, under any other.

accused not committed or held to bail for the offence, any Justice may discharge the witnesses from gaol by an order according to Form (P. 2.)

The above sections are so plain and particular in their enactments, as to render it unnecessary to make any further analysis of their contents than what has just been given. With the help of the Forms to which they refer, the Justices can hardly go astray in acting under their respective provisions. See, *post*, "Witness."

Restoration of prisoner's property.—Justices have, in certain cases, the same powers as those possessed by the Judge at the trial, to order the restoration of property belonging to the prisoner taken possession of by the constable on his apprehension. In such cases, the Justices will consider whether or not there is any connection between the subject-matter of the charge and the property sought to be returned; or, whether or not the property is the subject of crimes which may form the subject of inquiry. If it appears not to be, they will act wisely in ordering it to be restored, provided it be in itself of a harmless nature. (See the remarks of Mr. Justice Patteson on this subject, in *R. v. O'Donnell*, 7 C. & P., 138; and also s. 26 of 11 & 12 Vic., c. 42, enabling Justices to order any money found upon the prisoner to be applied to or towards the payment of the expenses of conveying him to prison). With regard to bailing the accused, see, *ante*, "Bail," p. 32.

Where the accused does not make any statement, declining,—as he sometimes does, by the advice of his attorney,—to do so, or replying of his own accord, that he has nothing to say, the following Memorandum should be made and signed by the Justice, the entry being written after the *jurat* to the depositions:—

"The above-named accused A. B., after having been duly cautioned, declines (under the advice of his Attorney) to make any statement; (or, says he has nothing to say).

(Signature of Justice) "J. S."

JUSTICES.

No. 2.

ANNO UNDECIMO & DUODECIMO VICTORIÆ REGINÆ.—CAP. XLIII.

An Act to facilitate the performance of the Duties of Justices of the Peace out of Sessions, within England and Wales, with respect to summary Convictions and Orders. [14th August, 1848].

I. In all cases where information shall be laid or complaint made of offences committed, Justices may issue summons to persons to answer the same.—How summons to be served.—Justices not obliged to issue summonses in certain cases.—No objection allowed for want of form].—Whereas it would conduce much to the improvement of the Administration of Justice within England and Wales, so far as respects Summary Convictions, and Orders to be made by Her Majesty's Justices of the Peace therein, if the several Statutes and parts of Statutes relating to the duties

of such Justices in respect of such Summary Convictions and Orders were consolidated, with such additions and alterations as may be deemed necessary, and that such duties should be clearly defined by such positive enactment: Be it therefore declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That in all cases where an information shall be laid before one or more of Her Majesty's Justices of the Peace for any county, riding, division, liberty, city, borough, or place within England or Wales, that any person has committed or is suspected to have committed any offence or act within the jurisdiction of such Justice or Justices for which he is liable by law, upon a summary conviction for the same before a Justice or Justices of the Peace, to be imprisoned or fined, or otherwise punished, and also in all cases where a complaint shall be made to any such Justice or Justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise, then and in every such case it shall be lawful for such Justice or Justices of the Peace to issue his or their summons (A.) directed to such person, stating shortly the matter of such information or complaint, and requiring him to appear at a certain time and place before the same Justice or Justices, or before such other Justice or Justices of the same county, riding, division, liberty, city, borough, or place as shall then be there, to answer to the said information or complaint, and to be further dealt with according to law; and every such summons shall be served by a constable or other peace officer, or other person to whom the same shall be delivered, upon the person to whom it is so directed, by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode; and the constable, peace officer, or person who shall serve the same in manner aforesaid, shall attend at the time and place and before the Justices in the said summons mentioned, to depose, if necessary, to the service of the said summons: Provided always, that nothing herein mentioned shall oblige any Justice or Justices of the Peace to issue any such summons in any case where the application for any order of Justices is by law to be made *ex parte*: Provided also, that no objection shall be taken or allowed to any information, complaint, or summons, for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the Justice or Justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such Justice or Justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day.

II. *If summons be not obeyed, Justice may issue warrant; or may issue warrant in the first instance; or if summons, having been duly served, be not obeyed, the Justices may proceed ex parte*.—That if the person so served with a summons as aforesaid shall not be and appear before the Justice or Justices at the time and place mentioned in such summons, and

it shall be made to appear to such Justice or Justices, by oath or affirmation, that such summons was so served what shall be deemed by such Justice or Justices to be a reasonable time before the time therein appointed for appearing to the same, then it shall be lawful for such Justice or Justices, if he or they shall think fit, upon oath or affirmation being made before him or them substantiating the matter of such information or complaint to his or their satisfaction, to issue his or their warrant (B.) to apprehend the party so summoned, and to bring him before the same Justice or Justices, or before some other Justice or Justices of the Peace in and for the same county, riding, division, liberty, city, borough, or place, to answer to the said information or complaint, and to be further dealt with according to law; or upon such information being laid as aforesaid for any offence punishable on conviction, the Justice or Justices before whom such information shall have been laid, may, if he or they shall think fit, upon oath or affirmation being made before him or them substantiating the matter of such information to his or their satisfaction, instead of issuing such summons as aforesaid, issue in the first instance his or their warrant (C.) for apprehending the person against whom such information shall have been so laid, and bringing him before the same Justice or Justices, or before some other Justice or Justices of the Peace in and for the same county, riding, division, liberty, city, borough, or place, to answer to the said information, and to be further dealt with according to law; or if where a summons shall be so issued as aforesaid, and upon the day and at the place appointed in and by the said summons for the appearance of the party so summoned, such party shall fail to appear accordingly in obedience to such summons, then and in every such case, if it be proved upon oath or affirmation to the Justice or Justices then present that such summons was duly served upon such party a reasonable time before the time so appointed for his appearance as aforesaid, it shall be lawful for such Justice or Justices of the Peace to proceed *ex parte* to the hearing of such information or complaint, and to adjudicate thereon, as fully and effectually, to all intents and purposes, as if such party had personally appeared before him or them in obedience to the said summons.

III. *Form of Warrant.*—Where and how warrant may be executed.—*Certain Provisions of 11 & 12 Vict., c. 42, as to backing of warrants, to extend to warrants issued under this Act.—No objection allowed for want of form in the warrant, or for any variance between it and the evidence adduced; but if the party charged is deceived by the variation, he may be committed or discharged upon recognizance; but if he fail to re-appear, the Justice may transmit the recognizance to the Clerk of the Peace.*—That every such warrant to apprehend a defendant, that he may answer to any such information or complaint as aforesaid, shall be under the hand and seal or hands and seals of the Justice or Justices issuing the same, and may be directed either to any constable or other person by name, or generally to the constable of the parish or other district within which the same is to be executed, without naming him, or to such constable and all other constables within the county or other district within which the Justice or Justices issuing such warrant hath or have jurisdiction, or generally to all the constables within such last-mentioned county or district, and it shall state shortly the matter of the information or complaint on

which it is founded, and shall name or otherwise describe the person against whom it has been issued, and it shall order the constable or other person to whom it is directed to apprehend the said defendant, and to bring him before one or more Justice or Justices of the Peace (as the case may require) of the same county, riding, division, liberty, city, borough, or place, to answer to the said information or complaint, and to be further dealt with according to law; and that it shall not be necessary to make such warrant returnable at any particular time, but the same may remain in full force until it shall be executed; and such warrant may be executed by apprehending the defendant at any place within the county, riding, division, liberty, city, borough, or place within which the Justices issuing the same shall have jurisdiction, or, in case of fresh pursuit, at any place in the next adjoining county or place within seven miles of the border of such first-mentioned county, riding, division, liberty, city, borough, or place, without having such warrant backed as hereinafter mentioned; and in all cases where such warrant shall be directed to all constables or peace officers within the county or other district within which the Justice or Justices issuing the same shall have jurisdiction, it shall be lawful for any constable, headborough, tithingman, borsholder, or other peace officer for any parish, township, hamlet, or place situate within the limits of the jurisdiction for which such Justice or Justices shall have acted when he or they granted such warrant, to execute such warrant in like manner as if such warrant were directed specially to such constable by name, and notwithstanding that the place in which such warrant shall be executed shall not be within the parish, township, hamlet, or place for which he shall be such constable, headborough, tithingman, borsholder, or other peace officer; and such of the provisions and enactments contained in a certain Act of Parliament made and passed in this present Session of Parliament, intituled, "*An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales, with respect to persons charged with indictable offences*," as to the backing of any warrant, and the indorsement thereon by a Justice of the Peace or other officer, authorizing the person bringing such warrant, and all other persons to whom the same was originally directed, to execute the same within the jurisdiction of the Justice or officer so making such indorsement, as are applicable to the provisions of this Act, shall extend to all such warrants, and to all warrants of commitment issued under and by virtue of this Act, in as full and ample a manner as if the said several provisions and enactments were here repeated and made parts of this Act: Provided always, that no objection shall be taken or allowed to any such warrant to apprehend a defendant so issued upon any such information or complaint as aforesaid under or by virtue of this Act, for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the informant or complainant as hereinafter mentioned; but if any such variance shall appear to the Justice or Justices present and acting at such hearing to be such that the party so apprehended under such warrant has been thereby deceived or misled, it shall be lawful for such Justice or Justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day, and in the meantime to commit (D.) the said defendant to the house of correc-

tion or other prison, lock-up house, or place of security, or to such other custody as the said Justice or Justices shall think fit, or to discharge him upon his entering into a recognizance (E.), with or without surety or sureties, at the discretion of such Justice or Justices, conditioned for his appearance at the time and place to which such hearing shall be so adjourned: Provided always, that in all cases where a defendant shall be discharged upon recognizance as aforesaid, and shall not afterwards appear at the time and place in such recognizance mentioned, then the said Justice who shall have taken the said recognizance, or any Justice or Justices who may then be there present, upon certifying (F.) upon the back of the said recognizance the nonappearance of the defendant, may transmit such recognizance to the Clerk of the Peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such nonappearance of the said defendant. (See section 4 of 14 Vic., No. 43).

IV. *Description of the property of partners, &c.; of the property of counties; of the property in goods provided for the poor; of the property in materials for parish roads; of the property in materials for turnpike roads, &c.; of the property of Commissioners of sewers*].—That in any information or complaint, or the proceedings thereon, in which it shall be necessary to state the ownership of any property belonging to or in the possession of partners, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state the property to belong to the person so named and another or others, as the case may be, and whenever in any information or complaint, or the proceedings thereon, it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in manner aforesaid; and whenever in any such information or complaint, or the proceedings thereon, it shall be necessary to describe the ownership of any work or building made, maintained, or repaired at the expense of any county, riding, division, liberty, city, borough, or place, or of any materials for the making, altering, or repairing of the same, they may be therein described as the property of the inhabitants of such county, riding, division, liberty, city, borough, or place respectively; and all goods provided by parish officers for the use of the poor may in any such information or complaint, or the proceedings thereon, be described as the goods of the churchwardens and overseers of the poor of the parish, or of the overseers of the poor of the township or hamlet, or of the guardians of the poor of the union to which the same belong, without naming any of them; and all materials and tools provided for the repair of highways at the expense of parishes or other districts in which such highways may be situate, may be therein described as the property of the surveyor or surveyors of such highways respectively, without naming him or them; and all the materials or tools provided for making or repairing any turnpike road, and buildings, gates, lamps, boards, stones, posts, fences, or other things erected or provided for the purpose of any such turnpike road, may be described as the property of the commissioners or trustees of such turnpike road, without naming them; and all property of the commissioners of sewers of any

district may be described as the property of such commissioners, without naming them.

V. *Prosecution and punishment of aiders and abettors in the commission of offences*.—That every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough, or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed.

VI. *Provisions of 11 & 12 Vic., c. 42, as to Justices in one county, &c., acting in another to extend to this Act*.—That such of the provisions and enactments in the Act aforesaid made and passed in the present Session of Parliament, intituled, "*An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales, with respect to persons charged with indictable offences*," whereby a Justice of the Peace for one county, riding, division, liberty, city, borough, or place may act for the same whilst residing or being in an adjoining county, riding, division, liberty, city, borough, or place of which he is also a Justice of the Peace, or whereby a Justice of the Peace for any county at large, riding, division, or liberty, may act as such within any city, town, or precinct next adjoining thereto or surrounded thereby, being a county of itself, or otherwise having exclusive jurisdiction, as are applicable to the provisions of this Act, shall be deemed to be incorporated into this Act, and to extend to all acts required of or to be performed by Justices of the Peace, under or by virtue of this Act, in as full and ample a manner as if the said provisions and enactments were here repeated and made parts of this Act.

VII. *Power to Justice to summon witnesses to attend and give evidence; if summons be not obeyed, Justices may issue warrant; in certain cases, may issue warrant in the first instance.—Persons appearing on summons, &c., refusing to be examined, may be committed*.—That if it shall be made to appear to any Justice of the Peace, by the oath or affirmation of any credible person, that any person within the jurisdiction of such Justice is likely to give material evidence in behalf of the prosecutor or complainant or defendant, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the hearing of such information or complaint, such Justice may and is hereby required to issue his summons (G. 1.) to such person under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons, before the said Justice, or before such other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place as shall then be there, to testify what he shall know concerning the matter of the said information or complaint; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and no just excuse shall be offered for such neglect or refusal, then, (after proof upon oath or affirma-

tion of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and that a reasonable sum was paid or tendered to him for his costs and expenses in that behalf), it shall be lawful for the Justice or Justices before whom such person should have appeared to issue a warrant (G. 2.) under his or their hands and seals to bring and have such person, at a time and place to be therein mentioned, before the Justice who issued the said summons, or before such other Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify as aforesaid, and which said warrant may, if necessary, be backed as hereinbefore is mentioned, in order to its being executed out of the jurisdiction of the Justice who shall have issued the same; or if such Justice shall be satisfied by evidence upon oath or affirmation, that it is probable that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his warrant (G. 3.) in the first instance, and which, if necessary, may be backed as aforesaid; and if on the appearance of such person so summoned before the said last-mentioned Justice or Justices, either in obedience to the said summons or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any Justice of the Peace then present, and having there jurisdiction, may by warrant (G. 4.) under his hand and seal commit the person so refusing to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding seven days, unless he shall in the meantime consent to be examined and to answer concerning the premises. (17 Vic., No. 39, s. 8).

VIII. *Complaints for an order need not be in writing*.—That in all cases of complaints upon which a Justice or Justices of the Peace may make an order for the payment of money, or otherwise, it shall not be necessary that such complaint shall be in writing, unless it shall be required to be so by some particular Act of Parliament upon which such complaint shall be framed.

IX. *As to proceedings upon informations for offences punishable on summary convictions*.—*The party charged, if deceived by variation between information and evidence, may be committed or discharged upon recognizance; but if he fail to re-appear, the Justice may transmit the recognizance to the Clerk of the Peace*.—That in all cases of informations for any offences or acts punishable upon summary conviction any variance between such information and the evidence adduced in support thereof as to the time at which such offence or act shall be alleged to have been committed shall not be deemed material, if it be proved that such information was, in fact, laid within the time limited by law for laying the same; and any variance between such information and the evidence adduced in support thereof, as to the parish or township in which the offence or act shall be alleged to have been committed, shall not be deemed material,

provided that the offence or act be proved to have been committed within the jurisdiction of the Justice or Justices by whom such information shall be heard and determined; and if any such variance, or any variance in any other respect between such information and the evidence adduced in support thereof, shall appear to the Justice or Justices present and acting at the hearing to be such that the party charged by such information has been thereby deceived or misled, it shall be lawful for such Justice or Justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day, and in the meantime to commit (D.) the said defendant to the house of correction or other prison, lock-up house, or place of security, or to such other custody as the said Justice or Justices shall think fit, or to discharge him, upon his entering into a recognizance (E.) with or without surety or sureties, at the discretion of such Justice or Justices, conditioned for his appearance at the time and place to which such hearing shall be so adjourned: Provided always, that in all cases where a defendant shall be discharged upon recognizance as aforesaid, and shall not afterwards appear at the time and place in such recognizance mentioned, then the said Justice who shall have taken the said recognizance or any Justice or Justices who may then be there present, upon certifying (F.) upon the back of the said recognizance the non-appearance of the defendant, may transmit such recognizance to the Clerk of the Peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance of the said defendant.

X. *Manner of making complaint or laying information.*—*When warrant issued in the first instance, information to be upon oath, &c.*—That every such complaint upon which a Justice or Justices of the Peace is or are or shall be authorized by law to make an order, and that every information for any offence or act punishable upon summary conviction, unless some particular Act of Parliament shall otherwise require, may respectively be made or laid without any oath or affirmation being made of the truth thereof; except in cases of informations where the Justice or Justices receiving the same shall thereupon issue his or their warrant in the first instance to apprehend the defendant as aforesaid, and in every such case where the Justice or Justices shall issue his or their warrant in the first instance, the matter of such information shall be substantiated by the oath or affirmation of the informant, or by some witness or witnesses on his behalf, before any such warrant shall be issued; and every such complaint shall be for one matter of complaint only, and not for two or more matters of complaint; and every such information shall be for one offence only, and not for two or more offences; and every such complaint or information may be laid or made by the complainant or informant in person, or by his Counsel or Attorney or other person authorized in that behalf.

XI. *Time limited for such complaint or information.*—That in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months

from the time when the matter of such complaint or information respectively arose.

XII. *As to the hearing of complaints and informations.—Places in which Justices shall sit to hear complaints, &c., to be deemed an open Court.—Parties allowed to plead by Counsel or Attorney*]—That every such complaint and information shall be heard, tried, determined, and adjudged by one or two or more Justice or Justices of the Peace, as shall be directed by the Act of Parliament upon which such complaint or information shall be framed, or such other Act or Acts of Parliament as there may be in that behalf; and if there be no such direction in any such Act of Parliament, then such complaint or information may be heard, tried, determined, and adjudged by any one Justice of the Peace for the county, riding, division, liberty, city, borough, or place where the matter of such information shall have arisen; and the room or place in which such Justice or Justices shall sit to hear and try any such complaint or information shall be deemed an open and public Court, to which the public generally may have access, so far as the same can conveniently contain them; and the party against whom such complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by Counsel or Attorney on his behalf; and every complainant or informant in any such case shall be at liberty to conduct such complaint or information respectively and to have the witnesses examined and cross-examined by Counsel or Attorney on his behalf.

XIII. *If defendant does not appear, Justices may proceed to hear and determine, or issue warrant, and adjourn the hearing till defendant is apprehended.—If defendant appear, and complainant, &c., does not, Justice may dismiss the complaint, &c., or, at discretion, adjourn hearing and commit or discharge defendant upon recognizances; but if he fail to re-appear, the Justice may transmit the recognizance to the Clerk of the Peace.—If both parties appear, Justice to hear and determine the case*.—That if at the day and place appointed in and by the summons aforesaid for hearing and determining such complaint or information, the defendant against whom the same shall have been made or laid shall not appear when called, the constable or other person who shall have served him with the summons in that behalf shall then declare, upon oath, in what manner he served the said summons; and if it appear to the satisfaction of any Justice or Justices that he duly served the said summons, in that case such Justice or Justices may proceed to hear and determine the case in the absence of such defendant, or the said Justice or Justices, upon the non-appearance of such defendant as aforesaid, may, if he or they think fit, issue his or their warrant in manner hereinbefore directed, and shall adjourn the hearing of the said complaint or information until the said defendant shall be apprehended; and when such defendant shall afterwards be apprehended under such warrant he shall be brought before the same Justice or Justices, or some other Justice or Justices of the same county, riding, division, liberty, city, borough, or place, who shall thereupon, either by his or their warrant (H.) commit such defendant to the house of correction or other prison, lock-up house, or place of security, or, if he or they think fit, verbally to the custody of the constable or other person

who shall have apprehended him, or to such other safe custody as he or they shall deem fit, and order the said defendant to be brought up, at a certain time and place, before such Justice or Justices of the Peace as shall then be there, of which said order the complainant or informant shall have due notice; or if upon the day and at the place so appointed as aforesaid such defendant shall attend voluntarily in obedience to the summons in that behalf served upon him, or shall be brought before the said Justice or Justices by virtue of any warrant, then, if the complainant or informant, having had such notice as aforesaid, do not appear by himself, his Counsel or Attorney, the said Justice or Justices shall dismiss such complaint or information, unless for some reason he or they shall think proper to adjourn the hearing of the same unto some other day, upon such terms as he or they shall think fit, in which case such Justice or Justices may commit (D.) the defendant in the meantime to the house of correction or other prison, lock-up house, or place of security, or to such other custody as such Justice or Justices shall think fit, or may discharge him, upon his entering into a recognizance (E.) with or without surety or sureties, at the discretion of such Justice or Justices, conditioned for his appearance at the time and place to which such hearing shall be so adjourned; and if such defendant shall not afterwards appear at the time and place mentioned in such recognizance, then the said Justice who shall have taken the said recognizance, or any Justice or Justices who may then be there present, upon certifying (F.) on the back of the recognizance the non-appearance of the defendant, may transmit such recognizance to the Clerk of the Peace of the county, riding, division, liberty, city, borough, or place within which the offence shall be laid to have been committed, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance of the said defendant; but if both parties appear, either personally or by their respective Counsel or Attorneys, before the Justice or Justices who are to hear and determine such complaint or information, then the said Justice or Justices shall proceed to hear and determine the same. (*Id.*, s. 16).

XIV. *Proceedings on the hearing of complaints and informations.*—*Proviso*.—That where such defendant shall be present at such hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he have any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be, and if he thereupon admit the truth of such information or complaint, and show no cause or no sufficient cause why he should not be convicted, or why an order should not be made against him, as the case may be, then the Justice or Justices present at the said hearing shall convict him or make an order against him accordingly; but if he do not admit the truth of such information or complaint as aforesaid, then the said Justice or Justices shall proceed to hear the prosecutor or complainant, and such witnesses as he may examine, and such other evidence as he may adduce, in support of his information or complaint respectively, and also to hear the defendant and such witnesses as he may examine and such other evidence as he may adduce in his defence, and also to hear such witnesses as the prosecutor or complainant may examine in reply, if such defendant shall have examined any witnesses or given any evidence other

than as to his the defendant's general character; but the prosecutor or complainant shall not be entitled to make any observations in reply upon the evidence given by the defendant, nor shall the defendant be entitled to make any observations in reply upon the evidence given by the prosecutor or complainant in reply as aforesaid; and the said Justice or Justices, having heard what each party shall have to say as aforesaid, and the witnesses and evidence so adduced, shall consider the whole matter, and determine the same, and shall convict or make an order upon the defendant, or dismiss the information or complaint, as the case may be; and if he or they convict or make an order against the defendant, a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction (I. 1-3.) or order (K. 1-3.) shall afterwards be drawn up by the said Justice or Justices in proper form, under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the Clerk of the Peace, to be by him filed among the Records of the General Quarter Sessions of the Peace; or if the said Justice or Justices shall dismiss such information or complaint, it shall be lawful for such Justice or Justices, if he or they shall think fit, being required so to do, to make an order of dismissal of the same (L.) and shall give the defendant in that behalf a certificate thereof (M.) which said certificate afterwards, upon being produced, without further proof, shall be a bar to any subsequent information or complaint for the same matters respectively against the same party: Provided always, that if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the Statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same. (17 Vic., No. 39, ss. 15, 16, *post*).

XV. *Prosecutors and complainants in certain cases to be deemed competent witnesses, and examined on oath, &c.*—That every prosecutor of any such information, not having any pecuniary interest in the result of the same, and every complainant in any such complaint as aforesaid, whatever his interest may be in the result of the same, shall be a competent witness to support such information or complaint respectively; and every witness, at any such hearing as aforesaid, shall be examined upon oath or affirmation, and the Justice or Justices before whom any such witness shall appear for the purpose of being so examined shall have full power and authority to administer to every such witness the usual oath or affirmation. See "Oaths," *post*, and 17 Vic., No. 39, s. 14).

XVI. *Power to Justices to adjourn the hearing of cases, and commit defendant, or suffer him to go at large, or discharge him upon his own recognizance; but if he fail to re-appear, the Justice may transmit the recognizance to the Clerk of the Peace.*—That before or during such hearing of any such information or complaint it shall be lawful for any one Justice, or for the Justices present, in their discretion, to adjourn the hearing of the same to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties, or their respective Attorneys or Agents then present, and in the meantime the said Justice or Justices may suffer the defendant to go at large, or may commit (D.) him to the common gaol or house of correction, or other prison, lock-up house,



or place of security in the county, riding, division, liberty, city, borough, or place for which such Justice or Justices shall be then acting, or to such other safe custody as the said Justice or Justices shall think fit, or may discharge such defendant, upon his entering into a recognizance (E.), with or without surety or sureties, at the discretion of such Justice or Justices, conditioned for his appearance at the time and place to which such hearing or further hearing shall be adjourned; and if at the time or place to which such hearing or further hearing shall be so adjourned either or both of the parties shall not appear personally, or by his or their Counsel or Attorneys respectively, before the said Justice or Justices, or such other Justice or Justices as shall then be there, it shall be lawful for the Justice or Justices then there present, to proceed to such hearing or further hearing as if such party or parties were present; or if the prosecutor or complainant shall not appear, the said Justice or Justices may dismiss such information or complaint, with or without costs, as to such Justices shall seem fit: Provided always, that in all cases where a defendant shall be discharged on recognizance as aforesaid, and shall not afterwards appear at the time and place mentioned in such recognizance, then the said Justice or Justices who shall have taken the said recognizance, or any other Justice or Justices who may then be there present, upon certifying (F.) on the back of the recognizance the non-appearance of such accused party, may transmit such recognizance to the Clerk of the Peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance of the said defendant.

XVII. *Form of Convictions and Orders*.—That in all cases of conviction where no particular Form of such conviction is or shall be given by the Statute creating the offence or regulating the prosecution for the same, and in all cases of conviction upon Statutes hitherto passed, whether any particular Form of conviction have been therein given or not, it shall be lawful for the Justice or Justices who shall so convict to draw up his or their conviction on parchment or on paper in such one of the Forms of conviction (I. 1-3.) in the Schedule to this Act contained as shall be applicable to such case, or to the like effect; and where an order shall be made, and no particular Form of order is or shall be given by the Statute giving authority to make such order, and in all cases of orders to be made under the authority of any Statutes hitherto passed, whether any particular Form of order shall therein be given or not, it shall be lawful for the Justice or Justices by whom such order is to be made, to draw up the same in such one of the Forms of orders (K. 1-3.) in the Schedule to this Act contained as may be applicable to such case, or to the like effect; and in all cases where by any Act of Parliament authority is given to commit a person to prison, or to levy any sum upon his goods or chattels by distress, for not obeying any order of a Justice or Justices, the defendant shall be served with a copy of the minute of such order before any warrant of commitment or of distress shall issue in that behalf, and such order or minute shall not form any part of such warrant of commitment or of distress. (17 Vic., No. 39, ss. 9, 10, and 16).

XVIII. *Power to Justice to award costs, which shall be specified in*

conviction or order of dismissal, and may be recovered by distress].—That in all cases of summary conviction or of orders made by a Justice or Justices of the Peace, it shall be lawful for the Justice or Justices making the same, in his or their discretion, to award and order in and by such conviction or order that the defendant shall pay to the prosecutor or complainant respectively such costs as to such Justice or Justices shall seem just and reasonable in that behalf; and in cases where such Justice or Justices, instead of convicting or making an order as aforesaid, shall dismiss the information or complaint, it shall be lawful for him or them, in his or their discretion, in and by his or their order of dismissal, to award and order that the prosecutor or complainant respectively shall pay to the defendant such costs as to such Justice or Justices shall seem just and reasonable, and the sums so allowed for costs shall in all cases be specified in such conviction or order or order of dismissal aforesaid, and the same shall be recoverable in the same manner and under the same warrants as any penalty or sum of money adjudged to be paid in and by such conviction or order is to be recoverable; and in cases where there is no such penalty or sum to be thereby recovered, then such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of such distress by imprisonment, with or without hard labour, for any time not exceeding one calendar month, unless such costs shall be sooner paid.

XIX. Power to Justice to issue warrant of distress.—*How warrant to be backed.*—*Where the issuing a warrant would be ruinous to defendant, or where there are no goods, Justice may commit him to prison*].—That where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the Statute authorizing such conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where by the Statute in that behalf no mode of raising or levying such penalty, compensation, or sum of money, or of enforcing the payment of the same, is stated or provided, it shall be lawful for the Justice or Justices making such conviction or order, or for any Justice of the Peace for the same county, riding, division, liberty, city, borough, or place, to issue his or their warrant of distress (N. 1.2.) for the purpose of levying the same, which said warrant of distress shall be in writing, under the hand and seal of the Justice making the same; and if after delivery of such warrant of distress to the constable or constables to whom the same shall have been directed to be executed sufficient distress shall not be found within the limits of the jurisdiction of the Justice granting such warrant, then, upon proof alone being made on oath of the handwriting of the Justice granting such warrant before any Justice of any other county or place, such Justice of such other county or place shall thereupon make an indorsement (N. 3.) on such warrant, signed with his hand, authorizing the execution of such warrant within the limits of his jurisdiction, by virtue of which said warrant and indorsement the penalty or sum aforesaid, and costs, or so much thereof as may not have been before levied or paid, shall and may be levied by the person bringing such warrant, or by the person or persons to whom such warrant was originally directed, or by any constable or

other peace officer of such last-mentioned county or place, by distress and sale of the goods and chattels of the defendant in such other county or place: Provided always, that whenever it shall appear to any Justice of the Peace to whom application shall be made for any such warrant of distress as aforesaid that the issuing thereof would be ruinous to the defendant and his family, or wherever it shall appear to such Justice, by the confession of the defendant or otherwise, that he hath no goods or chattels whereon to levy such distress, then and in every such case it shall be lawful for such Justice, if he shall deem it fit, instead of issuing such warrant of distress, to commit such defendant to the house of correction, or if there be no house of correction within his jurisdiction, then to the common gaol, there to be imprisoned, with or without hard labour, for such time and in such manner as by law such defendant might be so committed in case such warrant of distress had issued, and no goods or chattels could be found whereon to levy such penalty or sum and costs aforesaid.

XX. *Justice, after issuing warrant, may suffer defendant to go at large, or order him into custody, until return be made, unless he gives security by recognizance; but if he fail to re-appear, the Justice may transmit the recognizance to the Clerk of the Peace*].—That in all cases where a Justice of the Peace shall issue any such warrant of distress it shall be lawful for him to suffer the defendant to go at large, or verbally or by a written warrant in that behalf to order the defendant to be kept and detained in safe custody until return shall be made to such warrant of distress, unless such defendant shall give sufficient security, by recognizance or otherwise, to the satisfaction of such Justice, for his appearance before him at the time and place appointed for the return of such warrant of distress, or before such other Justice or Justices for the same county, riding, division, liberty, city, borough, or place, as may then be there: Provided always, that in all cases where a defendant shall give security by recognizance as aforesaid, and shall not afterwards appear at the time and place in such recognizance mentioned, then the said Justice who shall have taken the said recognizance, or any Justice or Justices who may then be there present, upon certifying (F.) on the back of the recognizance the non-appearance of the defendant, may transmit such recognizance to the Clerk of the Peace of the county, riding, division, liberty, city, borough, or place within which the offence shall be laid to have been committed, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *primâ facie* evidence of such non-appearance of the said defendant.

XXI. *In default of sufficiency of distress, Justice may commit defendant to prison*].—That if at the time and place appointed for the return of any such warrant of distress the constable who shall have had the execution of the same shall return (N. 4.) that he could find no goods or chattels or no sufficient goods or chattels whereon he could levy the sum or sums therein mentioned, together with the costs of or occasioned by the levying of the same, it shall be lawful for the Justice of the Peace before whom the same shall be returned to issue his warrant of commitment (N. 5.) under his hand and seal, directed to the same or any other constable, reciting the conviction or order shortly, the issuing of the warrant of

distress, and the return thereto, and requiring such constable to convey such defendant to the house of correction, or if there be no house of correction, then to the common gaol of the county, riding, division, liberty, city, borough, or place for which such Justice shall then be acting, and there to deliver him to the keeper thereof, and requiring such keeper to receive the defendant into such house of correction or gaol, and there to imprison him, or to imprison him and keep him to hard labour, in such manner and for such time as shall have been directed and appointed by the Statute on which the conviction or order mentioned in such warrant of distress was founded, unless the sum or sums adjudged to be paid, and all costs and charges of the distress, and also the costs and charges of the commitment and conveying of the defendant to prison, if such Justice shall think fit so to order, (the amount thereof being ascertained and stated in such commitment), shall be sooner paid.

XXII. *In all cases of penalties, convictions, or orders, where the Statute provides no remedy in default of distress, Justice may commit defendant to prison*].—And whereas by some Acts of Parliament Justices of the Peace are authorized to issue warrants of distress to levy penalties or other sums recovered before them by distress and sale of the offender's goods, but no further remedy is thereby provided in case no sufficient distress be found whereon to levy such penalties: Be it therefore enacted, That in all such cases, and in all cases of convictions or orders where the Statute on which the same are respectively founded provides no remedy in case it shall be returned to a warrant of distress thereon that no sufficient goods of the party against whom such warrant shall have been issued can be found, it shall nevertheless be lawful for the Justice to whom such return is made, or to any other Justice of the Peace for the same county, riding, division, liberty, city, borough, or place, if he or they shall think fit, by his warrant as aforesaid, to commit the defendant to the house of correction or common gaol as aforesaid for any term not exceeding three calendar months, unless the sum or sums adjudged to be paid, and all costs and charges of the distress, and of the commitment and conveying of the defendant to prison, (the amount thereof being ascertained and stated in such commitment), shall be sooner paid.

XXIII. *Power to Justices to order commitment in the first instance for non-payment of a penalty, or of a sum ordered to be paid*].—That in all cases where the Statute by virtue of which a conviction for a penalty or compensation, or an order for the payment of money, is made, makes no provision for such penalty or compensation or sum being levied by distress, but directs that if the same be not paid forthwith, or within a certain time therein mentioned, or to be mentioned in such conviction or order, the defendant shall be imprisoned, or imprisoned and kept to hard labour, for a certain time, unless such penalty, compensation, or sum shall be sooner paid, in every such case such penalty, compensation, or sum shall not be levied by distress; but if the defendant do not pay the same, together with costs, if awarded, forthwith, or at the time specified in such conviction or order for the payment of the same, it shall be lawful for the Justice or Justices making such conviction or order, or for any other Justice of the Peace for the same county, riding, division, liberty, city, borough, or place, to issue his or their warrant of commitment (O. 1. 2.) under his or their

hand and seal or hands and seals, requiring the constable or constables to whom the same shall be directed to take and convey such defendant to the house of correction or common gaol for the county, riding, division, liberty, city, borough, or place aforesaid, as the case may be, and there to deliver him to the keeper thereof, and requiring such keeper to receive such defendant into such house of correction or gaol, and there to imprison him, or to imprison him and keep him to hard labour, as the case may be, for such time as the Statute on which such conviction or order is founded as aforesaid shall direct, unless the sum or sums adjudged to be paid, and also the costs and charges of taking and conveying the defendant to prison, if such Justice or Justices shall think fit so to order, shall be sooner paid.

XXIV. *Power to Justices to order commitment where the conviction is not for a penalty, nor the order for payment of money, and the punishment is by imprisonment, &c.*—Costs may be levied by distress, and in default defendant may be committed for a further term].—That where a conviction does not order the payment of any penalty, but that the defendant be imprisoned, or imprisoned and kept to hard labour, for his offence, or where an order is not for the payment of money, but for the doing of some other act, and directs that in case of the defendant's neglect or refusal to do such act he shall be imprisoned, or imprisoned and kept to hard labour, and the defendant neglects or refuses to do such act, in every such case it shall be lawful for such Justice or Justices making such conviction or order, or for some other Justice of the Peace for the same county, riding, division, liberty, city, borough, or place, to issue his or their warrant of commitment (P. 1. 2.) under his or their hand and seal or hands and seals, and requiring the constable or constables to whom the same shall be directed to take and convey such defendant to the house of correction or common gaol for the same county, riding, division, liberty, city, borough, or place, as the case may be, and there to deliver him to the keeper thereof, and requiring such keeper to receive such defendant into such house of correction or gaol, and there to imprison him, or to imprison him and keep him to hard labour, as the case may be, for such time as the Statute on which such conviction or order is founded as aforesaid shall direct; and in all such cases, where by such conviction or order any sum for costs shall be adjudged to be paid by the defendant to the prosecutor or complainant, such sum may, if the Justice or Justices shall think fit, be levied by warrant of distress (P. 3. 4.) in manner aforesaid, and in default of distress the defendant may, if such Justice or Justices shall think fit, be committed (P. 5.) to the same house of correction or common gaol in manner aforesaid, there to be imprisoned for any time not exceeding one calendar month, to commence at the termination of the imprisonment he shall then be undergoing, unless such sum for costs, and all costs and charges of the said distress, and also the costs and charges of the commitment and conveying of the defendant to prison, if such Justice or Justices shall think fit so to order, shall be sooner paid.

XXV. *Imprisonment for a subsequent offence to commence at expiration of that for previous offence*].—That where a Justice or Justices of the Peace shall upon any such information or complaint as aforesaid adjudge the defendant to be imprisoned, and such defendant shall then be in prison undergoing imprisonment upon a conviction for any other offence,

the warrant of commitment for such subsequent offence shall in every such case be forthwith delivered to the Gaoler to whom the same shall be directed; and it shall be lawful for the Justice or Justices issuing the same, if he or they shall think fit, to award and order therein and thereby that the imprisonment for such subsequent offence shall commence at the expiration of the imprisonment to which such defendant shall have been previously adjudged or sentenced.

XXVI. *If information be dismissed costs may be recovered by distress upon prosecutor, &c., who in default may be committed*].—That where any information or complaint shall be dismissed with costs as aforesaid, the sum which shall be awarded for costs in the order for dismissal may be levied by distress (Q. 1.) on the goods and chattels of the prosecutor or complainant in manner aforesaid; and in default of distress or payment such prosecutor or complainant may be committed (Q. 2.) to the house of correction or common gaol in manner aforesaid, for any time not exceeding one calendar month, unless such sum and all costs and charges of the distress, and of the commitment and conveying of such prosecutor or complainant to prison, (the amount thereof being ascertained and stated in such commitment), shall be sooner paid.

XXVII. *After appeal against conviction or order Justice may issue warrants of distress for execution of the same.—Costs of appeal, how recovered*].—That after an appeal against any such conviction or order as aforesaid shall be decided, if the same shall be decided in favour of the respondents, the Justice or Justices who made such conviction or order, or any other Justice of the Peace of the same county, riding, division, liberty, city, borough, or place, may issue such warrant of distress or commitment as aforesaid for execution of the same, as if no such appeal had been brought; and if upon any such appeal the Court of Quarter Sessions shall order either party to pay costs, such order shall direct such costs to be paid to the Clerk of the Peace of such Court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay the same shall not be bound by any recognizance conditioned to pay such costs, such Clerk of the Peace or his Deputy, upon application of the party entitled to such costs, or of any person on his behalf, and on payment of a fee of one shilling, shall grant to the party so applying a certificate (R.) that such costs have not been paid; and upon production of such certificate to any Justice or Justices of the Peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for him or them to enforce the payment of such costs by warrant of distress (S. 1.) in manner aforesaid, and in default of distress he or they may commit (S. 2.) the party against whom such warrant shall have issued in manner hereinbefore mentioned for any time not exceeding three calendar months, unless the amount of such costs, and all costs and charges of the distress, and also the costs of the commitment and conveying of the said party to prison, if such Justice or Justices shall think fit so to order, (the amount thereof being ascertained and stated in such commitment), shall be sooner paid.

XXVIII. *On payment of penalty, &c., distress not to be levied, or the*

party, if imprisoned for non-payment, shall be discharged].—That in all cases where any person, against whom a warrant of distress shall issue as aforesaid, shall pay or tender to the constable having the execution of the same the sum or sums in such warrant mentioned, together with the amount of the expenses of such distress up to the time of such payment or tender, such constable shall cease to execute the same; and in all cases in which any person shall be imprisoned as aforesaid for non-payment of any penalty or other sum, he may pay, or cause to be paid, to the keeper of the prison in which he shall be so imprisoned, the sum in the warrant of commitment mentioned, together with the amount of the costs, charges, and expenses (if any) therein also mentioned; and the said keeper shall receive the same, and shall thereupon discharge such person, if he be in his custody for no other matter.

XXIX. *In cases of summary proceedings one Justice may issue summons or warrant, &c., and after conviction or order may issue warrant of distress, &c.*].—That in all cases of summary proceedings before a Justice or Justices of the Peace out of Sessions, upon any information or complaint as aforesaid, it shall be lawful for one Justice to receive such information or complaint, and to grant a summons or warrant thereon, and to issue his summons or warrant to compel the attendance of any witnesses, and to do all other necessary acts and matters preliminary to the hearing, even in cases where by the Statute in that behalf such information or complaint must be heard and determined by two or more Justices; and after the case shall have been so heard and determined one Justice may issue all warrants of distress or commitment thereon; and it shall not be necessary that the Justice who so acts before or after such hearing shall be the Justice or one of the Justices by whom the said case shall be heard and determined: Provided always, that in all cases where by Statute it is or shall be required that any such information or complaint shall be heard and determined by two or more Justices, or that a conviction or order shall be made by two or more Justices, such Justices must be present and acting together during the whole of the hearing and determination of the case.

XXX. *Regulations as to the payment of Clerks' Fees*].—That the fees to which any Clerk of the Peace, Clerk of the Special Sessions, or Clerk of the Petty Sessions, or Clerk to any Justice or Justices out of Sessions, shall be entitled shall be ascertained, appointed, and regulated in manner following; (that is to say), the Justices of the Peace at their Quarter Sessions for the several counties, ridings, divisions of counties, and liberties throughout England and Wales, and the Council or other governing body of every borough in England and Wales, shall, from time to time, as they shall see fit, respectively make tables of the fees which in their opinion should be paid to the Clerks of the Peace, to the Clerks of Special and Petty Sessions, and to the Clerks of the Justices of the Peace within their several jurisdictions, and which said tables respectively, being signed by the Chairman of every such Court of Quarter Sessions, or by the Mayor or other Head Officer of any such borough respectively, shall be laid before Her Majesty's Principal Secretary of State; and it shall be lawful for such Secretary of State, if he thinks fit, to alter such table or tables of fees, and to subscribe a certificate

or declaration that such fees are proper to be demanded and received by the several Clerks of the Peace, Clerks of Special Sessions and Petty Sessions, and the Clerks to the several Justices of the Peace throughout England and Wales; and such Secretary of State shall cause copies of such table or set of tables of fees to be transmitted to the several Clerks of the Peace throughout England and Wales, to be by them distributed to the several Clerks of Special Sessions and Petty Sessions, and to the Clerks to the Justices within their several districts respectively; and if after such copy shall be received by such Clerk or Clerks he or they shall demand or receive any other or greater fee or gratuity for any business or act transacted or done by him as such Clerk than such as is set down in such table or set of tables, he shall forfeit for every such demand or receipt the sum of twenty pounds, to be recovered by action of debt in any of the Superior Courts of Law at Westminster, by any person who will sue for the same: Provided always, that until such table or set of tables shall be framed and confirmed and distributed as aforesaid it shall be lawful for such Clerk or Clerks to demand and receive such fees as they are now by any rule or regulation of a Court of Quarter Sessions or otherwise authorized to demand and receive. (See "Fees," p. 115)

XXXI. Regulations as to whom penalties, &c., to be paid.—*Clerks to keep accounts of all moneys received, &c., in the Form in Schedule to this Act, and render the same to the Justices at Sessions*.—That in every warrant of distress to be issued as aforesaid, the constable or other person to whom the same shall be directed shall be thereby ordered to pay the amount of the sum to be levied thereunder unto the Clerk of the division in which the Justice or Justices issuing such warrant shall usually act; and if any person convicted of any penalty, or ordered by a Justice or Justices of the Peace to pay any sum of money, shall pay the same to any constable or other person, such constable or other person shall forthwith pay the same to such Clerk; and if any person committed to prison upon any conviction or order as aforesaid for non-payment of any penalty, or of any sum thereby ordered to be paid, shall desire to pay the same and costs before the expiration of the time for which he shall be so ordered to be imprisoned by the warrant for his commitment, he shall pay the same to the gaoler or keeper of the prison in which he shall be so imprisoned, and such gaoler or keeper shall forthwith pay the same to the said Clerk; and all sums so received by the said Clerk shall forthwith be paid by him to the party or parties to whom the same respectively are to be paid, according to the directions of the Statute on which the information or complaint in that behalf shall have been framed; and if such Statute shall contain no such directions for the payment thereof to any person or persons, then such Clerk shall pay the same to the Treasurer of the county, riding, division, liberty, city, borough, or place for which such Justice or Justices shall have acted, and for which such Treasurer shall give him a receipt without stamp; and every such Clerk, and every such Gaoler or Keeper of a prison, shall keep a true and exact account of all such moneys received by him, of whom and when received, and to whom and when paid, in the Form (T.) in the Schedule to this Act annexed, or to the like effect, and shall, once in every month, render a fair copy of

every such account unto the Justices who shall be assembled at the Petty Sessions for the division in which such Justice or Justices aforesaid shall usually act, to be holden on or next after the first day of every month, under the penalty of forty shillings, to be recovered by distress in manner aforesaid; and the said Clerk shall send or deliver every Return so made by him as aforesaid to the Clerk of the Peace for the county, riding, division, liberty, city, borough, or place within which such division shall be situate, at such times as the Court of Quarter Sessions for the same shall order in that behalf.

XXXII. *Forms in Schedule valid*].—That the several Forms in the Schedule to this Act contained, or Forms to the like effect, shall be deemed good, valid, and sufficient in law. (The adapted Forms will be found in Part II.)

XXXIII. *Metropolitan Police Magistrates and Stipendiary Magistrates in other places may act alone*.—*Nothing to affect powers, &c., contained in 10 G. IV., c. 44, 2 & 3 Vict., cc. 47, 71, and 3 & 4 Vict., c. 84.*

XXXIV. *The Lord Mayor, or any Alderman of London, may act alone*.—*Nothing to affect powers, &c., contained in 2 & 3 Vict., c. 94.*

XXXV. *To what this Act shall not extend*].—That nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who is or shall become chargeable to any parish, township, or place; nor to any complaints or orders made with respect to lunatics, or the expenses incurred for the lodging, maintenance, medicine, clothing, or care of any lunatic or insane person; nor to any information or complaint or other proceeding under or by virtue of any of the Statutes relating to Her Majesty's Revenue of Excise or Customs, Stamps, Taxes, or Post Office; nor shall anything in this Act extend or be construed to extend to any complaints, orders, or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to the backing of warrants for compelling the appearance of such putative father, or warrants of distress, or to the levying of sums ordered to be paid, or to the imprisonment of a defendant for nonpayment of the same; nor shall anything in this Act extend to any proceedings under the Acts of Parliament regulating or otherwise relating to the labour of children and young persons in mills or factories. (See "Distillers," Note (T), p. 80).

XXXVI. *After commencement of this Act the following Statutes and parts of Statutes repealed*:—18 Eliz., c. 5, s. 1, in part; 31 Eliz., c. 5, s. 5, in part; 27 G. II., c. 20, ss. 1, 2; 18 G. III., c. 19, ss. 1, 2, 3, 5; 33 G. III., c. 55, s. 3; 3 G. IV., c. 23; 5 G. IV., c. 18; 6 & 7 W. IV., c. 114, s. 2.

XXXVII. *Act to extend to Berwick-upon-Tweed, but not to Scotland, Ireland, &c., except as to backing of warrants under 11 & 12 Vict., c. 42.*

XXXVIII. *Commencement of Act.*

XXXIX. *Act may be amended, &c.*

SUMMARY.

(11 & 12 Vic., c. 43).

SUMMARY CONVICTIONS AND ORDERS.

I. PRELIMINARY OBSERVATIONS. II. OF THE INFORMATION AND COMPLAINT;—THEIR REQUISITES AND TIME; OATHS; AIDERS AND ABETTORS. III. THE PROCESS TO ISSUE TO DEFENDANTS. IV. OF COMPELLING WITNESSES' ATTENDANCE. V. THE HEARING; AMENDMENT OF VARIANCE. VI. THE ADJUDICATION. VII. OF CONVICTIONS. VIII. OF ENFORCING CONVICTIONS AND ORDERS; COSTS.

§ I.—PRELIMINARY OBSERVATIONS.

Duties of Magistrates under Summary Jurisdiction Act, 11 & 12 Vic., c. 43.—We have considered and explained the duties of Magistrates in the exercise of their ministerial functions under the first of Jervis's Acts, 11 & 12 Vic., c. 42. A similar course will now be attempted in regard to 11 & 12 Vic., c. 43, intitled "*An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales, with respect to Summary Convictions and Orders*." These duties it is the professed object of the Statute to "*define clearly by positive enactment*"; and, accordingly, its provisions have, for the most part, been framed with a minuteness and particularity that will only require attention in the perusal to be fully understood.

Issue of Summons or Warrant.—The first three sections of the Act now under consideration relate to the issuing of summonses or warrants; the information or complaint upon which they are to issue; and the mode of their service and execution. The distinction between an *information* and a *complaint* is thus stated by Mr. Oke:—"An information is the groundwork of a charge for an offence or act punishable summarily, either by fine or imprisonment; a complaint being an application on the non-payment of money, or for the doing of some other thing, subjecting the party in either case to imprisonment in default. An information is technically said to be *laid*; a complaint, to be *made*. A conviction is the affirmative result of an information; an order, that of a complaint."

§ II.—OF THE INFORMATION AND COMPLAINT;—THEIR REQUISITES AND TIME; OATHS; AIDERS AND ABETTORS.

Taking of Informations.—Informations will be first treated of, and it is recommended that these be always taken in writing, as the Statute evidently contemplates, although it does not expressly require, that they should be. Some offences *must*, by the particular Statute, be charged in writing. (1) The information need not be on oath if a summons only is

(1) The Act does not require the information to be in writing; but there are some provisions as to defects in substance and form in an information, (s. 1), and variance between evidence and an information, (s. 9), which could only refer to an information in writing. These provisions, however, would probably be applicable only in cases where the information is required to be in writing. On the other hand, it is to be observed that by s. 8 it is expressly enacted, That in all cases of

issued in the first instance, unless some particular Act requires otherwise; but, if a warrant be issued in the first instance, (as it may be by s. 2), it must be preceded by an information taken on oath, (κ) which oath may be administered in these words:—

“You, C. D., do swear that the contents of this your information (or, *complaint*), signed by you, are true and correct, to the best of your knowledge and belief. So help you God.”

It would be well for the Magistrate, before administering the oath, to read over the document to the informant, and satisfy himself that its contents are properly understood.

The information must be limited to one offence only, and may be laid by the prosecutor in person, or by his Counsel or Attorney, or other person authorized in that behalf. (S. 10). This latter provision cannot, of course, apply to cases where the information is required to be on oath.

Form of Oath.—The particular form or ceremony of administering an oath is quite distinct from the substance of the oath itself. (1 Phil. Ev. 8, 9th edit.) The form of oath, under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of God,—it being vain to compel a man to swear by a God in whom he does not believe, and whom he, therefore, does not reverence. (Puffend., b. 4, c. 2, s. 4). The rule of our law, therefore, is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such manner as they may consider binding on their consciences. By the Act shortening Acts (16 Vic., No. 1, s. 12) it is enacted, That whenever any Court, Judge, Justice, Officer, Commissioner, Arbitrator, or other person, shall be authorized by law, or by consent of parties, to hear and determine any matter or thing, such Court, &c., shall have authority to receive and examine evidence, and are hereby empowered to administer an oath or to take an affirmation from all such witnesses as are legally called before them respectively; and, by s. 13, in all such cases any false oath or affirmation is punishable as perjury.

Where, on a trial for high treason, one of the witnesses refused to be sworn in the usual manner, but put his hand to his buttons, and in reply to a question whether he was sworn, stated that he was sworn and was under oath, it was held sufficient. (*Love's Case*, 5 How. St. Tr., 113).

complaints upon which an order for the payment of money or otherwise is founded, it shall not be necessary that *such* complaint shall be in writing, unless it shall be required to be so by some particular Statute upon which such complaint shall be framed. From this it would appear to be the opinion of the framer of the Act that an *information* must be in writing. Mr. Archbold, however, in a note to his edition of Jervis's Act, (p. 100, 3rd ed.), says that neither the information nor the complaint need be in writing; but (p. 123) he adds, “In cases of much importance, or where any complexity or difficulty is likely to arise, the Magistrates will do well to require the information to be in writing.” It may be doubted whether, if the expression “laying the information” does not imply that it is to be in writing, a Magistrate would have authority to require one in writing in cases where there is no statutory provision to that effect. (Arnold's Sum. Conv., p. 16).

(κ) The words of the Statute (s. 10) are,—“oath or affirmation of the informant, or by some witness or witnesses in his behalf.”

Jews].—Jews are sworn upon the Pentateuch, with their heads covered. (*Omichund v. Barker*, Willes, 543).

Scotch Witnesses].—A Scotch witness has been allowed to be sworn by holding up the hand, without touching the book, or kissing it, and the form of the oath administered was: "You swear according to the custom of your country and of the religion you profess, that the evidence, &c." (*Mildrane's Case*, Leach, 412; *Mee v. Reid*, Peake, N. P. C., 23).

Scotch Covenanter].—The following is also given as the form of a Scotch Covenanter's oath:—"I, A. B., do swear by God Himself, as I shall answer to Him at the great day of Judgment, that the evidence I shall give to the Court, touching the matter in question, is the truth, the whole truth, and nothing but the truth. So help me God." (1 Leach, 412, n.)

Chinese].—The following is given as the form of swearing a Chinese; (Roscoe's Cr. Evid., 3rd ed., p. 131):—On entering the box, the witness immediately knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box, and broke it. The Crier of the Court then, by direction of the Interpreter, administered the oath in these words, which were translated by the Interpreter into the Chinese language:—"You shall tell the truth, and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer." (*Entrehman's case*, 1 Carr. & M., 248). Other forms,—as the extinguishing a lighted lucifer, or the cutting off the head of a cock,—are used in this Colony, because binding on the consciences of particular tribes of the Chinese.

Deaf and Dumb Persons, and all Foreigners, to be interpreted.—*Interpreter's Oath*].—Deaf and dumb witnesses or complainants, as well as all others who do not speak the English language, should be sworn through the medium of another person, duly qualified to interpret them, the Interpreter being first sworn faithfully to interpret the witnesses, in something like the following mode:—"You shall truly and faithfully interpret the evidence and all other matters and things which shall now be given touching the present charge, and the (French, or as the case may be) language into the English language, and the English language into the (French, &c.) language, according to the best of your skill and ability. So help you God."

Form of Information].—No Forms of Information are given by the Act, but its chief features may be mentioned:—(1) The name and addition of the informant or complainant; (2) The date of preferring it; (3) The place of preferring it; (4) The name and style of the Justice; (5) The offender's name and addition; (6) The nature or description of the offence; (7) The time and place where the offence was committed.

By whom the Complaint, &c., should be made].—In general, the party injured should, in person, go before the Magistrate; but the complaint may be laid by the Counsel or Attorney, or any person authorized by the informant; even for cases of *common assault*, where the Statute prescribes that the complaint is to be made by the *party aggrieved*, it has been held, that under particular circumstances, the information might be laid by another person: as in the case of an assault upon an idiot, or a child of tender years.

When Summary Proceedings may be taken against a defendant not present].—It is said that a summary proceeding can only be instituted against a person who is actually present, and committing or aiding in committing the offence; but this rule admits of many exceptions. In some cases, a man may be brought within a penal statute by the acts of his agents or servants. The employment of an agent in the defendant's usual course of business is sufficient evidence in such cases, whence the Magistrates may *presume* that such an agent was authorized to do the prohibited act with which the principal is charged. (Paley, 60).

Married Women].—Married women, if they have committed an offence without the coercion of the husband, actual or implied, are equally liable to be convicted and punished. (Paley, 59, 60). They may be prosecuted for penalties in respect of any injuries committed by them, and for all trespasses and wrongful acts of which they may be guilty, *if unconnected with contracts*. A husband and wife may be convicted jointly, and punished for a joint offence.

Infants].—Infants above the age of seven years may be prosecuted in respect of any injuries committed by them, and, generally, for all wrongful acts of which they may be guilty. It has been doubted, whether a minor is competent to enter into a contract of service; but the prevailing opinion is (*R. v. Lord*, 17 L. J. M. C., 181) strongly in favor of their power to do so, and consequently of the jurisdiction of the Magistrates in case of their misbehaviour, if the contract is not deficient in mutuality.

Joint Offenders].—The prosecutor may prosecute all or any of the parties, and the omission of a *particeps criminis* cannot be taken advantage of by the defendant; after conviction, however, of some of several offenders for a joint offence, the parties omitted cannot be proceeded against; but it is otherwise as to offences which are in their nature several.

Several Offenders].—It has been doubted whether several offenders can be joined in the same information, who have taken part in committing the same offence at the same time and place, whether the offence is in its nature joint or several; because the 10th section requires that the information shall be for one offence only, and the Forms in the Schedule appear to contemplate a single offender. The 10th section was evidently designed to prevent the joinder of several offences in different counts, but the Statute does not refer to offenders. (Arch., 126). Mr. Archbold's opinion is, that where two or more are jointly charged with an offence, it is but one offence within the meaning of the section. In *re Clee*, (21 L. J. M. C., 112), where separate convictions were drawn up upon a joint information, the Court refused to order the Justices to alter the conviction by making it a joint one.

Offences on the same or different days].—If distinct and complete acts are committed on different days, the offences are distinct, and subject to separate penalties, (*R. v. Matthews*, 10 Mod., 27); but this is doubtful upon a repetition of similar acts in pursuance of one object on the same day. No general rule can be laid down; each case depends on the nature of the particular offence, and the words of the particular Statute. (*Crepps v. Durden*, 1 Smith's L. C.; and Paley, 219).

Accessory may be joined with the Principal].—Where one is charged

as principal, and another as aiding, abetting, counselling, or procuring him to commit the offence, they may be *jointly* charged in the same information; for procurers, &c., in all offences less than felony, are deemed, in law, principals; and the offence of the person who actually committed the offence, and that of the person who counselled or procured him to do it, or aided him in doing it, may fairly be deemed but one offence.

Amendment].—The information should be as extensive in the statement of the offence as the apparent facts of the case, on their *ex parte* description, will warrant; because the informant should not, at the hearing, go so far beyond the terms of the charge, as comprised in the information, as to constitute a variance between his case and that laid in the information. At the same time, it is well that the Magistrates should avail themselves of the very ample powers of amendment given them by the Statute, and not allow themselves to countenance technical objections, based on variance, misnomer, misdescription, and the like. The words of the Statute are very comprehensive, and, in the highest degree, consistent with common sense:—"No objection shall be taken or allowed to any information, complaint, or summons, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but, if any such variance shall appear to the Justice or Justices present and acting at such hearing to be such that the party so summoned and appearing had been thereby deceived or misled, such Justice, &c., upon such terms as he or they shall think fit, may adjourn the hearing to some future day. (S. 1).

It would seem, therefore, that the discretion given by *this section* cannot be exercised in any *ex parte* proceedings; but see ss. 3 and 9, and *infra*, § V., "The Hearing; Amendment of Variance." In a very recent case, (*Martin v. Pridgeon*, 28 L. J. M. C., 179), a conviction was quashed where the summons was for being drunk and riotous, under a Local Police Statute, (10 & 11 Vic., c. 89, s. 29), and the conviction was for being drunk (under 21 Jac. I., c. 7); such a variance being held not to be within the meaning of s. 1. (L)

It may be added that, by s. 14, on the dismissal of the information or complaint, the Magistrate may grant a certificate thereof, which is a bar to any subsequent information or complaint for the "same matters against the same party;"—but, if the complaint is different to the charge, of what

(L) The following is the report of this case in the Jurist:—Martin was summoned for that he the said John Martin, in the public street at Torguay, within the district of Tormoham, "was drunk and guilty of riotous behaviour contrary to the Statute," an offence punishable under the Towns Police Clauses Act, 1847, (10 & 11 Vic., c. 89, s. 29). The Justices convicted him of drunkenness under 21 Jac. I., c. 7, s. 3. The conviction was held to be bad, and the variance not within s. 1 of 11 & 12 Vic., c. 43. Lord Campbell, C. J.:—"If the appellant had only been convicted of part of that with which he was charged in the summons, the conviction might have stood; but this conviction is under a different Statute." Crompton, J.:—"A party cannot be attacked under one Statute, and convicted under another. In this case the summons was good, and this is not a variance between the time and place mentioned in the summons and the evidence. The summons is for a kind of joint offence, and the Justices convicted the party of another offence, punishable in another and a different way. The proper course was to take out another summons. (5 Jur. N. S., 894).

use is the certificate? It will, in such case, require evidence to show what was in fact the charge upon which the certificate operated.

Time.—As to the time, the exact day is not material in any case, provided it be within the time limited by the Statute. Some Acts require that the conviction should take place within three calendar months from the time of the commission of the offence. Where this is the case, although the conviction be delayed beyond the prescribed time in consequence of an adjournment at the request of the defendant, it will, nevertheless, be held invalid. (*R. v. Tolley*, 3 East, 467). Where no time is prescribed for laying an information or complaint, s. 11 provides that in all cases "such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose." If the word "month" is mentioned in a Statute, it is now, since 16 Vic., No. 1, s. 6, "to mean calendar month, unless words are added, showing lunar month to be intended."

Place.—The importance of stating the place where the offence was committed is obvious; for, otherwise, it would not appear whether the Magistrate had any cognizance over it. The mere mention of the Colony in the margin will not supply the absence of this allegation; for such mention is only to indicate where the conviction is made, not where the offence was perpetrated. If the place has been once named, however, in the body of the conviction or information, it may be referred to by saying "in the Colony aforesaid."

Quantity and Value.—Where quantity and value are necessary parts of the case, as where they are the measure of compensation, the information should specify them as accurately as possible. In some cases, also, the jurisdiction of the Magistrates to convict depends on the amount of damage. (*Charter v. Graeme*, 18 L. J. M. C., 73).

Title of the Statute need not be set out.—It is sometimes usual in an information under a particular Statute, to set out its title, or otherwise describe it, and then to aver that the offence is contrary to its provisions; but this mode of naming the Statute is not necessary, although it is proper to conclude the information with the general averment of *contra formam Statuti*.

The information or conviction should contain an exact description of the offence, that the defendant may know the charge he has to answer; it should contain every ingredient required by the Statute to constitute the offence; for nothing should be left to intendment, or inference, or argument, for helping out the description. A direct and positive charge must be stated against the defendant; a mere statement of facts amounting to a presumption of guilt is not sufficient. Where the gist of the offence is *guilty knowledge*, it must be expressly alleged. The information should not state the legal result of facts, but the facts themselves, in order that the Court may judge whether or not they amount to the legal offence, as where a conviction under the Swearing Act omitted to set forth the oaths and curses.

Though, in general, it may be sufficient to state the offence in the words of the Statute, yet this is not always safe; for where the words of the Statute are general, as where it states merely the legal effect, it will still

be necessary to specify the facts constituting the offence. (*R. v. Jarvis*, 1 East, 643; Paley, 160; and cases cited by Oke, 67).

Words of the Statute should be followed].—Where the Statute under which the information is laid, in describing the offence, contains the words “maliciously,” “wilfully,” “knowingly,” “unlawfully,” and so on, it should be averred in the information that the defendant committed the offence “maliciously,” &c., as the case may be; and if there be any exemption or exception in the clause under which the offence is charged, and which must necessarily be read as a part thereof, such exemption and exception must be negated as applicable to the defendant; but matters of excuse, given by other distinct clauses or provisos, need not be specifically set out or negated. See *Steel v. Smith*, 1 B. & Ald., 94.

Where the case would admit of some excuse, for want of which there would be no legal offence, as in the case of a servant proceeded against for absenting himself from his master's service, there must be an allegation in the information and subsequent proceedings, that the absence complained of was without leave and lawful excuse, though the Statute (4 G. IV., c. 34) contained no such qualification, but made the servant liable to imprisonment for merely absenting himself. (*In re Turner*, 9 Q. B., 80; see, *post*, § VII., “Of Convictions;” *re Geswood*, 23 L. J. M. C., 35).

Written Instrument].—When a written instrument is referred to, it should be stated accurately. (*R. v. Powell*, 2 E. P. C., 276).

To the above may be added, that uncertainty and ambiguity, (such as stating an offence in the alternative), must be avoided.

Where a second or subsequent offence].—If the information is for a second or subsequent offence, for which a higher fine or greater imprisonment can be adjudged, it must be averred in the information and other proceedings, that the defendant has been previously convicted, with dates, &c. But see Note to Form No. 4 of Summary Conviction, *post*, Part II.

Practical Hints].—The information is usually drawn up by the Magistrate's Clerk, on application at his office, together with the summons or warrant, which is generally made returnable at the next Petty Sessions. It may, however, (as we said before), be made or laid by the complainant or informant in person, or by his Counsel or Attorney, or other person authorized in his behalf.

When prepared, the information, with the summons or warrant, (as the case may be), are taken to a Justice of the district, and the information being signed by the informant, and, if necessary, sworn also, in the presence of the Justice, he affixes his signature to both documents; and directing the summons or warrant to be delivered to the constable for service, he retains the information to be filed by the Clerk, and produced regularly at the ensuing Petty Sessions, or time appointed for the hearing.

The particularity with which the above ingredients should be stated, may be illustrated by a supposed case under the Malicious Injuries' Act, 7 & 8 G. IV., c. 30. Sect. 24 of this Act makes penal the wilful or malicious commission of any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is by the same Act provided. Let it be supposed that A. B. has wantonly or maliciously broken the windows of a

building belonging to C. D.; the information of the latter should be thus stated:—

Information under Malicious Injuries' Act. (7 & 8 G. IV., c. 30, s. 24).

New South Wales }
To wit. } The information of C. D., of , in the Colony
of New South Wales, labourer, taken upon oath before me, the under-
signed, one of Her Majesty's Justice of the Peace in and for the said
Colony of New South Wales, at , in the said Colony, this
day of , in the year of our Lord , who
saith that A. B., of , in the said Colony of New South Wales,
labourer, within the space of three calendar months last past, to wit, on the
day of last, at , in the Colony afore-
said, did wilfully (or, maliciously,—EITHER will do) commit damage, injury,
and spoil to and upon a certain window, the property of the said C. D., the
said informant then and there being, by then and there breaking two panes
of glass therein, and the wood (or, lead-work) thereof, and thereby doing
injury to the said C. D. to the amount of five shillings, contrary to the form of
the Statute in such case made and provided.

Taken and sworn before me, the day and year first above
written.

C. D.

J. S.

The above information is required to be on oath by the Statute, and to be laid within three calendar months from the time of the offence. It is also requisite that some actual damage, however small in amount, should be alleged. (*Buller v. Turly*, M. & M., 54).

Statement of the Offence.—The most material part to be considered, as we have seen, in convictions and informations, is the *statement of the offence*. Nothing, at first sight, seems so easy and plain a matter; whereas, it often turns out to be a very difficult one. In many cases, indeed, the skill of a special pleader would not be unworthily employed in filling up that apparently simple blank, supplied by the words "*here state the offence*." It is of great importance that Magistrates should be particularly careful in seeing that any conviction or information to which they append their signature, contains a legal definition of the offence charged. No doubt, they must frequently depend on the Clerk of the Bench, or the Attorney employed by the prosecutor, in this and other matters where their summary jurisdiction is invoked; but as, in some cases, they may become personally responsible for the results of an error, they will do well to render themselves, as far as their time and abilities will allow, independent of the judgment or dictation of either official or professional agency. See further on this subject, where some cases are collected, § VII., "Of Convictions."

Upon this subject may be mentioned (*R. v. Constable*, 7 D. & R., 663) the case of a Magistrate who was found guilty of a misdemeanor, for having committed a person under the Vagrant Act without having examined the witnesses on oath, or seen the accused, before the commitment was signed. In a more recent case, (*Caudle v. Seymour*, 1 Q. B., 889), the Magistrate went with his Clerk to the complainant's residence to take an information, but signed it without seeing the informant, the deposition being taken and the oath administered by his Clerk. In reference to this proceeding, the Judges of the Court of Queen's Bench expressed strong disapprobation, and held, that such irregularity deprived the Magistrate

of any statutable protection in an action against him for false imprisonment. "A Magistrate," said Patteson, J., "ought to examine the witness himself: he ought not to commit this part of his duty to his Clerk."—"I am glad," said Coleridge, J., "to have an opportunity of stating my opinion on this point, because it is a common practice to take depositions in a manner like that which was here described. The taking of affidavits in this Court is quite different; the act is purely ministerial; the party says what he pleases, and the effect of it comes to be considered by the Court afterwards. But a Magistrate taking depositions has a discretion to exercise: he is to examine the witness, hear his answers, and judge of the manner in which they are given. If he does not, how is he in a condition, supposing the charge were felony, to decide whether or not bail shall be taken?"

To revert to the requisites of informations and convictions: it is not easy to furnish an unerring guide to any particular case; but the following passage from Paley will suffice to give some general idea of what they should contain,—(Paley on Convictions, 3rd edit., p. 67):—"The general qualities of a conviction, in substance, are, first, that it be full and correct; and, secondly, as the whole jurisdiction in summary proceedings is founded upon, and solely derived from, special Acts of Parliament, it is fundamentally required, in a conviction for any offence, that the directions of the particular Statute relative to that offence should appear upon the face of it to have been substantially complied with, both as to what regards the subject-matter of the offence being clearly brought within the meaning of the Act, and also the method of proceeding and final judgment. And if the charge falls short of the necessary legal description of the offence, the omission is not cured by any allegations of its being done *unlawfully*, or *fraudulently*, or the like; or by stating that it was *against the form of the Statute*; for the allegation is no more than a legal inference, which must be supported by the premises."

By the 29th section of the Act under consideration, one Justice may, in all cases, receive an information, and grant a warrant or summons; but the conviction must be before one or two, according to the particular Act by which the offence is created. In the case supposed in the information above given, one Justice alone may convict.

Aider and Abettor may be informed against].—The offence therein stated has been alleged as committed by one person only; but the information might have included also any person who was *aiding and abetting* A. B. in breaking the windows of C. D. The 5th section of the Act—(in speaking of the Act now under consideration, is always intended Jervis's, viz., 11 & 12 Vic., c. 43)—has introduced, in the words of Mr. Saunders, "a novelty into the summary jurisdiction of justice, and creates for their adjudication a large body of offences not heretofore cognizant by any tribunal. By this enactment, every person who shall aid, abet, counsel, or procure the commission of any offence punishable on summary conviction, may thereby subject himself to the same punishment. Thus, a man who is a party to the drunkenness of another, may be convicted as an aider; so by encouraging another to profane swearing, and in all the other cases, great and small, in which a Justice can summarily convict."

In the recent case, *ex parte Smith*, (27 L. J. M. C., 186), it was held,

that this section provides for the punishments of persons who aid and abet the commission of offences punishable summarily, and is not limited to those cases where "a conviction" (strictly speaking) takes place; it was further decided that aiding and abetting, and counselling or procuring, are not in all cases different offences, but that they were offences "which may have been committed in one and the same act or conduct, and on the same occasion."

If, therefore, a second person, who shall be called E. F., was assisting or aiding A. B. in breaking the windows of C. D.,—as, for instance, handing him up stones to throw, or watching that no one approached, he might have been included in the same information, and would be chargeable with the same offence, or that laid against A. B. A few words would suffice, adding, after the conclusion of the offence laid against A. B., the following sentence:—

"And that E. F., of, &c., was then and there present, wilfully aiding and abetting the said A. B. to do and commit the said offence, contrary to the form of the Statute in such case made and provided."

Complaints].—With reference to complaints, as distinguished from informations, the following observations from Oke's Magisterial Synopsis will be sufficient, after what has been said respecting informations:—

"By a complaint is meant, a complaint upon which a Justice is or shall be authorized by law to make any order for the payment of money or otherwise, (ss. 1, 8, & 10), and these words, '*or otherwise*,' seem to apply to cases where the order is for the doing of some other act than paying money, on disobedience of which, imprisonment follows. See s. 24.

"What has been before said in regard to informations, as to the time of making the complaint,—by whom to be made,—when to be on oath, will equally apply to the complaints, except, as no warrant in the first instance can be granted on a complaint, that part as to the oath will be inapplicable.

"Section 8 expressly enacts that it shall not be necessary that such complaint shall be in writing, unless it shall be required to be so by some particular Act of Parliament upon which such complaint shall be framed; but, nevertheless, it would be advisable to have every complaint in writing.

"The same particularity as to facts is required as on an information in writing, and it must contain one matter of complaint only. (S. 10).

"It will be observed by the 1st section, that no objection shall be taken or allowed for any alleged defect in the complaint, in substance or in form, or for any variance between it and the evidence; but as a complaint is recited *verbatim* in the order and subsequent proceedings, it is unlike an information, and, as it cannot be amended, it requires more particularity in its preparation than an information now does. Sect. 9 does not apply to complaints."

§ III.—THE PROCESS TO ISSUE TO DEFENDANTS.

When the information has been laid, the Justice may, under the 1st and 2nd sections, grant a summons, and, on disobedience to such summons, a warrant; or he may, in the first instance, if he think fit, issue a war-

rant. In either case, however, the information must be substantiated on oath previous to the issue of a warrant. (M)

In the case supposed, under the Malicious Injuries' Act, the Statute having required the information to be on oath, no such substantiation would be necessary; but in cases where the information has been received without oath, no warrant can legally issue, either in the first instance or after service of summons, until the information has been verified by oath. This can be done where a warrant is, in the first instance, intended to be granted, by a memorandum in the following terms, at the foot or on the back of the information:—

The matter of the above (or, if endorsed on the back, *the within*) information is now substantiated before me, the said Justice, by oath of the above-named (or, *within-named*) C. D. (or, as the offence, by s. 10, need not be sworn to by the informant himself, *L. M.*) of in the said Colony of (*farmer*).

Signature of the party swearing to the offence—C. D. (or, *L. M.*)

Taken and sworn before me, the day and the year and at the place above-mentioned. J. S.

If a warrant be not granted in the first instance, but on proof of service a reasonable time before the time appointed, and disobedience of the summons, the following entry may be endorsed on the information:—

New South Wales }

To wit. }

The matter of the within information was on this day of , 18 , substantiated before me, the within-mentioned Justice, (or, *the undersigned, one of Her Majesty's Justices of the Peace in and for the, &c.*), at , in the said Colony, by the oath of the within-named C. D. (or, *L. M.*) of, &c., in the said Colony, farmer.

C. D. (or *L. M.*)

Before me,

J. S.

Summons].—In all cases where the Justices have not the power, or where it would be inexpedient, to issue a warrant to apprehend the defendant, the proper mode of procuring his appearance is by *summons*, directed to defendant personally. (Sch. A). Under some old Statutes a particular form of summons is prescribed; in such case, such form is to be preferred. (Nichols, p. 73).

The summons ought to contain a full statement, by way of recital, of the matter of the complaint, in order that the defendant may be apprised, as soon as possible, of the nature of the charges against him, and may be enabled to prepare his defence.

(M) In cases of petty larceny, it is proper to issue a warrant rather than a summons in the first instance, because the offence is in the nature of a *felony*, and, in the eye of the law, much more serious than other offences punishable by summary conviction. Where, however, the offence is not in the nature of felony, and there are no circumstances connected with the defendant which would lead the Justice to anticipate any evasion of the process, it is more proper to issue a summons; and, if the defendant should happen to be in a respectable situation of life, the propriety of issuing a summons in preference to a warrant is more distinctly obvious.

Upon those informations where warrants are issued in the first instance for the apprehension of parties, more caution is manifestly necessary than in the case of a summons, inasmuch as any defect or error in the proceedings would enable a defendant who should be taken into custody, to maintain an action for false imprisonment.

The summons should also set forth the *names* and *additions* of the complainant and the defendant, the nature of the offence charged, the *time* and *place* of appearance, the name and jurisdiction of the Justice before whom, and the *time* when, the information was laid; and it should be *dated*, and bear the signature and seal of the Justice.^(N) The defendant is bound not only to attend at the precise hour appointed, but to wait until the Justices are ready to hear the case during all reasonable hours of the same day. (*William v. Frith*, 1 Doug., 198). In issuing a summons, Justices should always allow sufficient time before its return, to enable a defendant to prepare for his defence, and procure the attendance of any witnesses on his behalf. If it should appear to the Magistrate that a defendant had not sufficient time to prepare himself, the hearing should be adjourned for a short period.

It is, indeed, advisable in all cases where practicable, to allow an interval of several days between the service of the summons and its return, that the defendant may not only have ample time to obtain legal advice, but also take out summonses for the attendance of unwilling witnesses; and the convenience of witnesses should be, to some extent, considered. As these summary charges are frequently made by parties under sudden excitement, it is well to allow them time for mature consideration, nor is any inconvenience likely to result from the delay; for if it is feared that the defendant will abscond, he may, in most cases, be apprehended under a warrant. Defendant's appearance waives any irregularity in the service of the summons; (*In re Williams*, 21 L. J. M. C., 46); but if he attends and asks for further time to enable him to arrange his defence, unless there is some reason to suspect bad faith on his part, the Justices should grant the application. In case of the defendant's non-appearance, if, on inquiry, the Magistrates be in any doubt as to the defendant's having had sufficient time, the hearing should be adjourned, and a fresh summons issued, or otherwise the constable should be ordered to give the defendant notice of the adjournment, and thus afford him another opportunity of obeying the summons. (*R. v. Stone*, 1 East, 639).

The summons is generally, in practice, made out in duplicate, both of which are signed and sealed by the Magistrate and delivered to the constable for service; one of them is served on the defendant by delivering it to him *personally*, or by leaving it with *some person* at his last and most usual place of abode; the other is endorsed by the person serving with a memorandum of service, and retained for production at the Police Office, (see *ante*, p. 177), where he is required to attend at the hearing of the case, to depose to the due service of the summons in case of his non-appearance, and the consequent necessity of issuing a warrant of apprehension, or proceeding against him *ex parte*. Most recent Statutes require it to be *left with* the defendant personally, or, in some cases, at his residence. Under the *common assault* clauses of 9 G. IV., c. 31, the summons is to be delivered *personally* to the defendant; but under the Petty Larceny and Malicious Injuries' Acts, (7 & 8 G. IV., cc. 29 & 30),

(N) This summons is generally signed in duplicate. *R. v. Chandler* (14 East, 267), decided, that leaving a copy at the house is sufficient, and that the delivery may be to a person on the premises, apparently residing there as a servant.

the service may be either personal, or by leaving the same at his usual place of abode.

It is, however, the practice of some Benches, without regard to the terms of particular Acts, to require proof from the constable that the summons, when not personally served, has been delivered to the wife, or child, or some immediate servant of the defendant, so as to afford a reasonable presumption that it has come to his hands, and is more especially expedient when the defendant, upon conviction, may be fined or imprisoned. (*R. v. Clement*, 4 B. & A., 218).

It was shown before in what cases a warrant should be issued in the first instance. *Vide* Note (M). Whenever a warrant is issued to take a defendant into custody, the Justice and his Clerk should arrange with the constable that the case may be brought to a hearing as soon as possible after the arrest, as it is illegal, as well as unjust, to detain a person in custody an unreasonable period for any of those minor offences which are the subject of summary conviction.

§ IV.—OF COMPELLING WITNESSES' ATTENDANCE.

Witnesses' Expenses.—Tender].—By s. 7, Justices are empowered to summon witnesses. Tender of expenses is necessary; what is a reasonable sum to tender will depend on the scale of allowance to witnesses on the preliminary inquiry in indictable offences, to which it would be well to adhere in summary convictions and orders. A tender may, it seems, be made to any person at the witness's abode. The legal mode of making a tender is, by producing the money, stating what it is for, and the amount, and without any condition being mentioned as requiring a receipt. It must be made in coin, and without asking for change, &c. (*Roscoe's Ev.*, 333). These expenses of witnesses will be part of the costs attending the conviction, &c. If the complaint be dismissed, or defendant be acquitted, or if he be convicted, and should *satisfy* the penalty and costs by going to prison, such expenses and costs shall fall upon the complainant. Upon proof on oath of due service of summons a warrant can be issued, or where the Justice is satisfied, on oath, that the witness will not attend without being compelled, he may issue a warrant in the first instance. (S. 7).

Should a witness, upon appearing in obedience to a summons or warrant, refuse to be examined on oath concerning the matter for which he was called upon to appear and give evidence,—or should refuse to take the oath,—or, having taken the oath, to answer such questions as shall be put to him, any Justice then present having jurisdiction, unless the witness offers some just excuse, may commit him to gaol for not exceeding seven days: (s. 7); and s. 8 of 17 Vic., No. 39, provides that, where Justices have power to summon any person as a witness, they shall have the like authority to require and compel him to bring and produce, for the purpose of evidence, all documents and writings in his possession and power, and to proceed against every such person in case of neglect or refusal, as in any case of neglect or refusal to attend, or refusal to be examined: Provided that no person shall be bound to produce any document or writing not specified or otherwise sufficiently described in the summons, or which he would not be bound to produce upon a subpoena *duces tecum* in the Supreme Court.

The warrant, where issued in the first instance, will be in the Form (B.) given by the Act, and, when issued on the disobedience of a summons, in the Form (C.) As to the summonses to witnesses and other matters not treated of in this Part, the Magistrates are referred to the Act itself, and the Forms. See Part II.

§ V.—THE HEARING; AMENDMENT OF VARIANCE.

The Hearing].—The mode of Hearing is prescribed by the 12th and following sections. It may always take place before one Justice, except where otherwise directed by Statute or Act of Council. The place of hearing is to be deemed an open and public Court, and both the complainant and the party informed against are entitled to the assistance of Counsel or Attorney, if they think fit to employ them. But, if the prosecutor is himself a witness, and has an Attorney or Counsel, it is inexpedient for him to address the adjudicating Justices otherwise than upon oath, and strictly to the facts, as it is desirable, for the due administration of justice, that the characters of advocate and witness should not be blended in the same person; and this rule applies even to the Attorney, who, if he be also a witness, ought not to be permitted to address the Bench. See *Stone v. Byron*, (16 L. J. Q. B., 32). But *Cobbett v. Hudson*, (22 L. J. Q. B., 11), has decided that, notwithstanding that it is very objectionable that a party to a suit should act as his own advocate, and afterwards give evidence in support of his own case, a Judge has no authority to prevent him.

The parties should conduct themselves orderly; otherwise they should be ejected, for there appears to be no authority in the Justices to commit for contempt.

Ordering Witnesses out of Court].—Before the case is entered into, either party may apply to have the witnesses ordered out of Court, which request should always be complied with. Medical witnesses are generally not included in the order; the Attorneys of the respective parties are always excepted.

Conviction on view].—In cases where the convictions may take place on view of a Justice, the defendant must still have an opportunity of making his defence, and a summons or warrant should issue in the usual form; except, perhaps, where apprehension without a warrant is allowed by the particular Act. (*R. v. Smith*, 9 J. P., 7, cited by Oke, Synopsis, 86, and *Attwood v. Joliffe*, 3 New Sess. C., 116).

When a Conviction to take place].—If the proceedings were commenced in due time by laying the information, the hearing and judgment may take place at any time beyond the period allowed; (Paley, 44); but if the making the conviction must be within the limited time, it is not enough that the laying the information be within the time, but the conviction made out of time is void; and no adjournment, even by consent of all parties, prolongs the Justice's authority over the case. (*R. v. Bellamy*, 1 B. & C., 500). The act of convicting, being a judicial act, cannot be performed on a Sunday. (9 Co., 666).

On the day appointed for hearing, if the complainant only, or the defendant only, appears, the Act gives a power in either case (ss. 13 & 16) to the Justices to adjourn, and in the meantime, according to their own

discretion, either to commit the defendant to gaol, or take his own recognizance or that of sureties for his reappearance. A similar power is given to the Justices, either before or during the hearing. "*Before the hearing*," says Mr. Oke, "would apply to cases where a defendant is apprehended before the usual day of Petty Sessions, and the witnesses are not, therefore, in attendance; or when two Justices are necessary to adjudicate, and only one is present at the time and place appointed by the summons, &c., for the hearing. *During the hearing* would apply to cases where the hearing has taken place, or partly taken place, and a material witness is absent, and the Justices wish to adjourn to obtain his attendance, or to take time to consider their judgment; and also where variances have misled the defendant."

Instead, however, of adjourning if the defendant only appears, the Justices may, if they please, (s. 13), dismiss the information; and, if the complainant only appears, they may proceed, *ex parte*, to hear the case in the absence of the defendant, or adjourn the hearing until he shall have been apprehended by warrant. "If both parties appear, either personally or by their respective Counsel or Attorneys, before the Justice or Justices who are to hear and determine such complaint or information, then the said Justice or Justices shall *proceed to hear and determine the same*." But this part of the 13th section must be read in connection with the first part of the 16th, which, as has been already stated, enables the Justices to adjourn, "in their discretion," either "*before or during the hearing*." It must not be understood, therefore, as imperative on the Justices to determine the matter forthwith, although both parties should appear and go into the case. In *Gelan v. Hall*, (27 L. J. M. C., 78), it was held, where by a Railway Act, penalties for breach of by-laws were recoverable before a Justice, and the railway officers were, under certain circumstances, authorized to seize offenders, and convey them before a Justice, without a warrant, and such Justice was "empowered and required to proceed immediately to the conviction or acquittal of such offender," that, although the Act creating the offence gave no power to the Justice to remand, yet that by this 16th section of 11 & 12 Vic., c. 43, the Justice had power to adjourn the hearing, and to issue a warrant of committal of the accused to the house of correction. (S. C. 2 H. & N., 379).

An adjournment on the ground of variance between the information and the evidence adduced in support thereof, is expressly provided for by the 9th section, which gives the Justices power, in such case, to secure the reappearance of the defendant either by committal, bail, or personal recognizance. Should the defendant, however, attend, as he is at liberty to do under 13th section, by Counsel or Attorney, the 9th section, strange to say, has omitted to make any provision for his appearance on the day to which the case may be adjourned. As to the particular variances, time and place are declared to be immaterial, provided the offence charged appear to have been committed within the jurisdiction of the Justice, and the information thereof laid within the time limited by law. The section then proceeds to state that if any such variance, or any variance in any other respect, shall appear, the Justice or Justices may, if he or they think the defendant has been misled or deceived thereby, adjourn the hearing of the case to some future day, *upon such terms as he or they shall think fit*.

"The result of the above enactments," says Mr. Oke, "seems to be to entirely supersede the use of the information, summons, or warrant, as substantial parts of the proceedings, beyond the fact of their being required by way of authority for the Justice's interference; but that the conviction entirely depends upon the case proved by the evidence, which neither recites nor even alludes to the information, summons, or warrant, as in the repealed Form given by the 3rd G. IV., c. 23. Although the strictness which was formerly required in informations will no longer be necessary, they must not, however, be so drawn as to deceive or mislead the defendant, by varying from the charge in the evidence, and so varying the nature of the case altogether; for in that case, the Justice, being empowered to adjourn the hearing of the case to some future day, *upon such terms as he shall think fit*, seems to be enabled to enforce upon parties preferring charges the necessity of drawing their informations in a legal form. (o) The cases and rules, therefore, which were decided upon informations and convictions before the passing of the 11 & 12 Vic., c. 43, may still be found serviceable as a guide in framing them at the present time, and will also be serviceable in *drawing up convictions*, as the above provisions only apply to the information or complaint, summons, and warrant,—more particularly as to the mode of describing the offence or matter of complaint, which, if correctly stated in the information or complaint, to ground the Justice's jurisdiction, and *thence recited or stated in the conviction and subsequent proceedings*, would save much trouble and inconvenience in the preparation of the latter."

Magistrates will do well to attend to the above suggestions, as in many cases the recital of the conviction in the warrant of commitment is, in point of fact, the recital of the information, and if that should be defective, the commitment will, probably, be defective also; whereas, a good conviction will be presumed, though none be actually drawn up, if a sufficient recital appear on the face of the warrant, which can hardly fail to be the case where the information has been properly framed.

In case of adjournment in any of the instances before-mentioned, no time is limited; but the Justice must take care that he do not, for the purpose of adjournment, *commit to prison* for an *unreasonable time*. His safe course will be, in cases of adjournment, either at his own instance or that of the complainant, to take bail; and where the latter has not shaped his information properly, to discharge the defendant upon his own recognizance. Even where the defendant himself should ask an adjournment, it must be a very serious case which would justify his committal to prison, especially where he has voluntarily appeared, and when it is taken into consideration, also, that he might not have appeared at all, if he had chosen to do so by Counsel or Attorney.

Dismissal of Charge on non-appearance of Complainant].—Before considering the mode of proceeding when both parties appear, it shall be

(o) The law on this subject would seem to be laid down too widely: see *Martin v. Pridgeon*, (28 L. J. M. C., 179). The case is given at length *supra*, (Note L). It may be remarked that the decision was on s. 1, and that the summons was under a local Statute. The proper course would be, to issue a new summons, drawn so as to meet the case that can be proved.

assumed that the defendant only, or his Attorney, has appeared, and that the Justice determines, instead of adjourning the hearing, to dismiss the charge. This he may do "if the complainant or informant, *having had such notice as aforesaid*, do not appear by himself, his Counsel, or Attorney." The notice referred to is, where the defendant has previously been apprehended and the hearing been adjourned, in which case notice of the adjournment is required by the Act to be given to the informant. The first thing, therefore, in such a case, would be proof of this notice, and the proof would depend on the manner in which the notice was served.

The Act makes no provision in this respect, but it is presumed the notice ought to be given by the Clerk to the Justices. Assuming it to have been served as well as given by him, he would, of course, be the party to prove the fact. The following Form is given as that in which the notice should be framed :—

Court of Petty Sessions for _____, the _____ day of _____, 18____, at _____,

I beg to give you notice that A. B., against whom a warrant was issued on your information, has been apprehended, and brought up this day at the place above named, and ordered by a Justice to be brought up at the same place on _____ next, at 12 o'clock at noon, on the hearing of the said information, when and where you are required to attend.

Yours, &c.

W. B., Clerk to the Justices.

To Mr. C. D., of _____

Printed Forms being supposed always ready, of all memoranda in use, a duplicate of the above notice can be quickly filled up, and the Clerk, having examined it with the original, should endorse on the duplicate, at the time of his serving the former, an entry to that effect, stating the day and time of service. He should then deposit it among the files of the Court, and it will be ready for use when wanted. The *service* by the Clerk, probably, can only take place when the complainant or his Attorney attends, for service on the latter would be sufficient; but the notice should still be given in the name of the Clerk.

Requisites to prove service of Notice of Adjournment.—If the complainant or his Attorney does not attend, and the Justices, nevertheless, see fit to adjourn, and for that purpose to issue a warrant for the apprehension of the defendant, the service of notice to complainant of the day named for the adjournment can be effected by a constable, in which case the Clerk should explain to him the contents, if he cannot write, and make an entry accordingly on the duplicate retained.

If he can write, let him make an endorsement of service on the duplicate. And in such case, the constable, or party serving the notice, should be instructed to be in attendance on the day appointed for the adjourned hearing; otherwise, should the complainant not attend, the notice to him of adjournment could not be proved, and, consequently, the Justices could not dismiss the charge.

Costs where charge dismissed in consequence of Complainant's non-appearance.—In dismissing the charge on non-attendance of the complainant at the hearing, the Justices may, if they please, under s. 18, give costs; and they are expressly authorized to give them, under s. 16, in cases of non-appearance of complainant after adjournment. The pro-

vision, however, was unnecessary in s. 16, and has been properly omitted in s. 13, the terms of s. 18 applying to *all cases* of dismissal of information, whether on the merits, or for want of appearance of parties, either in the first instance, or after the case has been adjourned.

The Form of the order of dismissal will be as given under the letter (L.); but under s. 14, it is discretionary with the Justices, in all cases, whether they will make the order or not; and, in any event, they need not make it, *unless required to do so*. Probably, if required to do so, they would refuse, and generally should, when the information is dismissed, in the first instance, on the ground of complainant's non-attendance, inasmuch as the making of the order would enable the defendant to obtain a certificate thereof (M.), and set it up as a bar against any future proceedings. There might be circumstances, however, which would induce the Justices to give the defendant costs against the complainant for not appearing, in which case an order would be necessary, and the consequent certificate operating as a bar could not be avoided. If the information be dismissed without any order being made at the request of the defendant, then, as it is not upon the merits, "it seems," says Mr. Oke, "to be in the nature of a non-suit in a civil case, and the complaint or information may be brought again." (P)

If the complainant only should appear, and the Justices determine, instead of issuing a warrant, to proceed in the absence of the defendant, they must first be satisfied *by the oath* of the constable that the summons has been served on the defendant; and, if personal service of it has not been effected, they should require proof that it has come to his knowledge in reasonable time before the day of hearing. If they entertain any doubt upon this point, it will be prudent to adjourn, giving defendant notice thereof, or to issue a fresh summons; but if they are satisfied on this head, they may at once proceed to deal with the charge. To make sure that the defendant is not in attendance, the constable should be directed to call out his name at the door of the room where the Court is held, three several times, and if he should not answer, the constable or other person who served the summons may then have the following oath administered to him by the Clerk:—

"You, A. B., shall make true answers to all such questions as shall be demanded of you touching this case. So help you God."

The result of this examination should be taken down in writing, and signed by the deponent as well as the Justices, and it should not only be ascertained that service has been effected, but also that such service has been in accordance with the terms prescribed by the Statute under which the information is laid, if it should contain any specific directions on that point.

It has been already stated before whom, and when, the hearing must take place.

The mode of hearing when both parties appear, is pointed out in s. 14 with great particularity; but "in respect of the examination and cross-

(P) But see *Tunncliffe v. Todd*, (17 L. J. M. C., 67; 5 C. B., 553), decided under the Assault Act, which would seem to apply to all summary proceedings.

examination of witnesses, and the right of addressing the Justices upon the case, in reply or otherwise," the practice, as nearly as may be, is to be in accordance with that of the Supreme Court upon the trial of an issue of fact in an action at law. (17 Vic., No. 39, s. 15). But before dealing with the matter judicially, the Justices may with great propriety, in many cases, endeavour to bring about a compromise between the complainant and defendant. Indeed, in summary convictions under the Larceny and Malicious Injuries' Acts, (7 & 8 G. IV., c. 29, s. 68; c. 30, s. 35), the Justices are empowered to arrange a compromise even *after a conviction*. In all such cases the costs should be paid immediately, as they cannot be enforced by the Justices, as neither a conviction nor an order of dismissal can be made.

If Defendant confesses].—If defendant, when called upon, admits the truth of the information, and so pleads guilty, the Bench is of course relieved from the necessity of going into evidence, and may at once adjudicate; and even where the particular Statute under which the information is laid, requires in terms that the offence be proved by the oath of one or more credible witnesses, it has been held that a defendant's confession is sufficient to satisfy the Statute. If the defendant admits the charge, but pleads justification, qualification, &c, although the admission dispenses with the necessity of proving the charge, yet the Justices should go into such evidence as is necessary to prove or negative the justification, &c., it being observed that the affirmative proof of any such matter which is relied upon in defence is thrown upon the defendant. When the information negatives any exemption, &c., the prosecutor need not prove such negative, but the defendant must prove the affirmative in his defence, if he wishes to have the advantage of it. (S. 14).

Evidence to be heard].—The rules of evidence have been briefly considered in another part of this work, (see "Evidence"), to which the reader is referred. It may be remarked, that Magistrates cannot be required to hear any evidence which ought not to influence them in their decision: they should require that sufficient evidence be adduced to prove the offence clearly, so as to satisfy the true intent and meaning of the Statute; and where a fine, in the nature of *compensation*, is to be imposed, evidence should be given of the extent of the damage.

It may be stated here that the appearance of the defendant, whether by himself or Attorney, not only operates as a waiver of any irregularity in the service of the summons, (*R. v. Johnson*, 1 Str., 261; *R. v. Stone*, 1 East, 649), but, if there has been no summons at all, such appearance cures that defect. (*R. v. JJ. of Wiltshire*, 12 A. & E., 791, and *R. v. Berry*, 5 Jur. N. S., 320). The evidence given at the hearing should be taken with the same strictness and regularity as observed in the Supreme Courts.

Necessity of Evidence being carefully recorded].—There is nothing in Jervis's Act to render it imperative to take down the evidence in writing; but it is a course which every Justice should adopt,—first, for his own protection; and, secondly, in fairness to the defendant; for, although it is not necessary to set out the evidence in the conviction, the Colonial Act 14 Vic., No. 43, contains certain provisions, both in favour of Justices and parties convicted before them, which might be rendered totally inef-

fectual by the want of written evidence. By s. 9 of that Act, any defect in a commitment may be cured, so as to prevent the discharge of a defendant on *Habeas Corpus*, if "the depositions" shall appear to the Court to warrant, in substance, the judgment of the Justices; and, by s. 15 of the same Act, in every case of summary conviction, "all parties indicted therein shall be entitled to demand and have copies of the information and depositions, &c., in like manner, and on the same terms, as they are provided with regard to depositions against a party committed or holden to bail." So also, by 17 Vic., No. 39, s. 10, "in every case where the facts or evidence *appearing by the depositions* shall support the adjudication of the Justices," convictions, or orders, or warrants may be amended. Now, whether or not these enactments amount to an express declaration that depositions in summary convictions shall be taken in writing, there can be no doubt that they contain an implied injunction to that effect, and still less doubt that the practice enjoined ought to be invariably followed. It were to be wished, perhaps, that upon this point the colonial Acts had been somewhat more explicit.

Competency of Witnesses].—The implied limitation as to the competency of informers imposed by s. 15, has been altogether removed by s. 14 of 17 Vic., No. 39, and the Legislature (see "Evidence") has now rendered competent complainants and informers in *all cases*, and defendants in complaints, but not in informations. It is said by Mr. Oke that "the law is, that where several offenders are charged, and the cases heard at one time, after all the evidence on both sides has been heard, if there be no evidence against one of them, he is then entitled to demand an acquittal; (*Wright v. Paulin*, R. & M. C. C., 128); but he is not entitled to a verdict in the midst of the inquiry, (*Emmett v. Butler*, 7 Taunt., 599), although the Court may in its discretion allow of his acquittal in any stage of the trial before the reply, in order that he may be examined as a witness. (*Bedder's case*, 1 Sid., 237). When acquitted, he is competent, (*Frazer's case*, 1 M. & Nal. Ev., 56); also, where one of several defendants pleads guilty, he may be called as a witness for the other defendants before sentence, unless he has an interest—as in conspiracy, &c.—in obtaining the discharge. (*Taylor Ev.*, 817). It is in the Justices' discretion either to dismiss the charge as against one defendant at the end of complainant's case, or when they have heard the defence." (See p. 97).

Husband and Wife].—By the general rule of law, before 16 Vic., No. 14, a husband and wife could not be witnesses for or against each other; the effect of that Act, and of 22 Vic., No. 7, has been pointed out: (see "Evidence," ante, p. 100); but they may be witnesses against each other in respect of any charge which affects their liberty and person. (*R. v. Wakefield*, 2 Russ., 605). The husband or wife of one prisoner cannot be called as a witness for other prisoners prosecuted with him or her for the same offence, unless it is quite clear that her evidence will not necessarily benefit her husband, and *vice versa*. (*R. v. Locker*, 5 Esp., 107, *Taylor Ev.*, 1059, 2nd ed.)

Infants].—The evidence of witnesses at any age is admissible, if it appear that they have sufficient discretion, and understand the moral obligation of an oath.

Want of Religion].—A man who has no religion whatever, or none that

can bind his conscience to speak the truth, cannot be a witness. The proper test is, not as to witness's belief in any particular creed, but whether he believes in a God, the obligation of an oath, and a future state of rewards and punishments.

No Incapacity from Crime.—No person is now excluded from being a witness, because a criminal.

Deaf and Dumb Persons.—Where a witness is deaf or dumb, another person should be sworn faithfully to interpret his signs: (see Form, Part II.); the usual oath should also be put to the witness through the interpreter. If, however, the witness can read and write, the questions and answers had better be written down.

Lunatic.—A lunatic is admissible as a witness, if he understands the obligation of an oath, and is capable of giving a correct account of the matter in issue. The former is a question for the jury. (*R. v. Hill*, 5 Cox C. C., 259).

The oath should be, as in criminal cases, administered to the witness before he gives his evidence, and may be in the following form:—

“The evidence which you shall give touching this information (or, *complaint*) shall be the truth, the whole truth, and nothing but the truth. So help you God.”

(As to oaths of Jews, Chinese, &c., see *ante*, p. 213; and as to proceedings if witnesses refuse to be examined on oath, &c., see s. 7).

By 16 Vic., No. 18, s. 19, “It shall be lawful for any Justices of the Peace in *Special or Petty Sessions*, in case it shall appear to them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any deposition, examination, or other proceeding made or taken before them, to direct such person to be prosecuted for such perjury, in case there shall appear to them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next Criminal Session of the Supreme Court, or for the next Circuit Court for the district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next Session or Circuit Court, and that he will then surrender and take his trial, and not depart the Court without leave;” and the Justices are to “require any person they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid: Provided always, that no such direction shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.”

Aiders or Abettors.—The first thing to be proved on a charge against an aider or abettor, where the case is heard as against them in the absence of the principal, would be that the principal offence was committed.

§ VI.—ADJUDICATION.

After the evidence on both sides has been closed, the Justices will either convict the defendant or dismiss the charge, and with or without costs, (s. 18), but they cannot dismiss the case and order defendant to pay costs; and if the defendant pleads not guilty, and the complainant then withdraws

the complaint, the case may be dismissed as not proved. (*Tunnicliffe v. Tedd*, 17 L. J. M. C., 67).

Adjourn to consider Judgment.—It seems they may adjourn to consider their determination or the proper penalty to be imposed, &c., or for the purpose of obtaining the evidence of a former conviction required, &c., as s. 16 authorizes an adjournment during the hearing *without specifying the cause*.

Division of Opinion.—Should there be a division of opinion on the case and the judgment, they should adjourn to procure the attendance of another Justice, and the case should be re-heard.

Whatever may be the result, whether a conviction or dismissal, the Clerk should make an entry thereof on the minutes of the proceedings. These proceedings, it is recommended, in summary convictions, should be recorded in a book kept for that purpose, and that the evidence of the witnesses, when given, should be entered therein, so that the grounds of each decision, as well as the decision itself, together with all the proceedings relating thereto, might be traced at once, and readily and conveniently referred to.

It has been already stated that, if the Justices dismiss the complaint, they may do so either with or without costs; but they cannot, if they dismiss the case, order costs to be paid *to the complainant*. The order of dismissal, if made, must be followed by a certificate in the Form (M), which will operate as a bar to any subsequent proceedings. If the order of dismissal give costs, the payment of them cannot be enforced until the complainant has been served with a copy of the minute of such order. (Sec. 17). The following Form will suffice for the minute:—

At a Petty Sessions of Her Majesty's Justices of the Peace for the
holden at _____, in and for the said _____, the _____ day of
_____, 186 _____,

C. D., Complainant,
against
A. B., Defendant.

It is adjudged and ordered, that the information (or *complaint*) in this case, for (*state shortly the charge*) be dismissed with costs, the said C. D. not appearing [or the said information (or *complaint*) not being proved]; and that the said C. D. shall forthwith (or, *on or before* _____ day of _____ next), pay to the said A. B. the sum of _____ shillings, for the costs incurred in his defence, to be recovered by distress, and in default, the said C. D. to be imprisoned for _____, unless sooner paid, (with the costs of distress and of conveyance to gaol).

W. B., Clerk to the Justice.

This minute should be issued in duplicate, and the time and mode of service endorsed upon it by the person who served it, and returned by the Clerk to the Justices. The mode of enforcing it, and the necessary forms in connection therewith, will be considered in conjunction with the same points relating to convictions.

The following extract from Oke's Synopsis furnishes some useful hints respecting adjudications in general, and touching some particular portions of the Act, which will much assist the Justices in their construction of, and proceedings under, it:—

“Having determined to convict or make an order, they (the Justices)

should openly pronounce their judgment, according as they are by law empowered to do in the particular case, neither for too much nor too little, as a judgment for too little is as faulty as a judgment for too much, (*R. v. Salamons*, 1 T. R., 252; *Whitehead v. Reg.*, 7 Q. B., 582; Paley, 231); and in doing so, they should distinctly state the amount of fine, or mitigated fine, or imprisonment and costs, or imprisonment in default, the mode of recovery and time of payment, the additional imprisonment for costs when adjudged; (in cases where the punishment is imprisonment only, and not a fine), the costs of conveyance to gaol, &c.; and, where the defendant is convicted at the same time of two or more offences, whether imprisonment for one is to commence at the termination of the other, or not. The amount of penalty or punishment is entirely in the Justices' discretion, where the Statute says '*not exceeding*' so much, or such a time; nor does it require that the punishment in default of payment of a penalty adjudged should be proportionate to the maximum imprisonment allowed by the Act, *i. e.*, if the maximum penalty be £5, and the maximum imprisonment two calendar months, that, if the Justices convict in £2 10s., they should commit for one calendar month; but they may commit for two; for the penalties, and imprisonment in default, are very disproportionate to each other throughout the whole of the summary jurisdiction."

Where a second offence, Evidence of a previous Conviction].—"In case of the charge being for a second or subsequent offence, for which an increased penalty can be awarded, the Justices should, after deciding to convict for the offence then before them, have legal proof of the previous conviction or convictions, first ascertaining that the subsequent conviction can be treated as such, and a higher penalty awarded, as, in many instances, a time is limited for the conviction for a second or subsequent offence from the previous conviction. The only legal admissible evidence of a previous conviction, where a Statute does not allow of any other, is either the conviction itself, produced by the proper officer, or by some one who has received it out of his custody, or an examined copy of the conviction in his custody. (10 J. P., 527). In some cases, (7 & 8 G. IV., cc. 29, 30), a certified copy under the hand of the Clerk of the Peace, is good evidence. In addition to this proof, however, there must be evidence of the identity of the defendant with the conviction, by the constable or some other person." (P. 102).

By the recent Evidence Act, (22 Vic., No. 7, s. 7), "In every case, civil or criminal, in which it shall be necessary to prove that any person was convicted of any offence, or sentenced to any punishment or pecuniary fine, before or by any Court or Justices, or was ordered by any Court or Justices to pay any sum of money, a certificate under the hand (or purporting to be) of the officer having ordinarily the custody of the records or documents and proceedings showing such conviction, sentence, or order, shall upon proof of the identity of the party, be sufficient evidence of such conviction, sentence, or order, and of the particular offence or matter in respect of which it was had, or passed, or made, if stated in such certificate: Provided that the time and place of such conviction, sentence, or order shall be stated therein, with the title of the Court in which, or the names of the Justices by or before whom, the same was so had or made;" and, by s. 9, "Every such certificate, or paper purporting to be such cer-

tificate, stating that the party signing the same has ordinarily the custody of the records, documents, or proceedings referred to therein, shall be *prima facie* evidence of that fact, and of the signature and official character of such party."

Consecutive periods of Imprisonment].—A Magistrate ought not, on conviction in several cases, to defer sentence in the second until the imprisonment in the first is about to expire, and then issue a warrant of detention for a second period of imprisonment. If two or more charges be brought before a Magistrate at the same time, it is his duty to adjudicate on them in succession, and without delay. If he convict upon more than one, where the punishment is imprisonment, he should make out *separate* warrants upon each conviction, the *second* imprisonment to *commence and take effect upon the expiration of the first.*" (*R. v. Wilkes*, 4 Burrows, 2577).

The power of adjudicating under s. 5 against a defendant who shall be in prison, "undergoing imprisonment upon a conviction for any other offence," requires some care in its application, and the following note of Mr. Oke upon the subject shows that its application may not be so practicable as was contemplated:—

"If the words 'in prison' and 'imprisonment' imply an actual confinement in the common gaol or house of correction, (as Mr. Archbold, in a note to the sect. p. 171, seems to think they do), then the section would be applicable to those cases only where the defendant is convicted of the subsequent offence in his absence, under s. 13, and particularly in some cases where the Statute requires the conviction to take place within a given time,—there being no authority in Justices to order a Gaoler to bring up a person in his custody to a Petty Sessions to answer a summary charge, unless he were in prison on a remand merely, and not by way of punishment. If, however, as has been contended, (1 Magis., p. 172, Wise's Supplement, 535), the defendant is 'in prison, undergoing imprisonment upon a conviction,' from the moment of his being convicted of the first offence the section applies; but then, only where the defendant is present at the time of conviction for both offences; for if he be convicted of the first or both offences *ex parte* (which he may be) on the same day, he would not be in prison at all at the time of the first conviction, for the imprisonment in such a case begins to run from the time of the defendant's being arrested under the commitment, and not from the date of the conviction or commitment. (*In re Bowdler*, 12 Q. B., 612, overruling *Fletcher's case*, 13 L. J. M. C., 16). Therefore, where the defendant is in actual confinement for the first offence at the time of the second conviction *ex parte*, the commitment for the first offence produced by the Gaoler will not, as likewise contended at 1 Magis., p. 172, be evidence of the previous conviction; but the usual proof of it must be given to the Justices. This section, it will be observed, does not apply to *orders* on complaints; but it will be applicable to all descriptions of convictions for offences, whether the imprisonment for the first or second offence is in default of payment of a fine, or in default of distress, or imprisonment absolutely for a time certain; but the cumulative imprisonment must be in all cases adjudged at the time of the hearing of the information and conviction, and not deferred till the expiration of the first im-
prisonment.

sonment, and the commitment must be forthwith delivered to the Gaoler." (See Form *post*, Part II.)

Penalty where several Offenders.—Where several offenders are convicted of the same offence, whether it be in its nature single or joint, a joint award of one fine against them is erroneous, for it ought to be several against each defendant; otherwise, one who has paid his proportionate part might have to continue in prison till all the others had paid theirs, which would be to punish him for the offence of another. (Paley, 224; *Morgan v. Brown*, 4 A. & E., 515; *R. v. Cridland*, 3 Jur. N. S., 1213 Q. B.)

Questionable whether a joint or several Offence.—It is often a question of considerable doubt, whether, if two or more commit an act punishable by a certain penalty, distinct penalties of the full amount can be imposed upon each defendant, or only one penalty amongst the whole; or, in other words, whether one offence is committed, or several. If a Statute impose a penalty upon a certain act, then, if two or more commit it, only one penalty is in general incurred. (*R. v. Blensdale*, 4 T. R., 809). If, however, the penalty imposed by the Statute be obviously on each offence, or if the offence committed be of a several nature, so that the guilt of each person is distinct from that of the other, a distinct penalty upon each should be imposed, as when a distinct offence. (*R. v. Hube*, 5 T. R., 542). In *R. v. Dean*, (12 M. & W., 39), Alderson, B., says, "You must look at the Statute to see whether every person is to be punished, or every offence to be punished. If every offence is to be punished, there is to be one penalty only, however large the number of persons who committed it; but if there are several penalties on each person, it is obviously otherwise."

In the case of a joint offence, the penalty is divisible according to the discretion of the Magistrate, and must appear separately on the conviction. (*Morgan v. Brown*, 4 A. & E., 515).

By s. 17, directions are given as to the forms of convictions and orders, which, except in the cases specified to the contrary, may be drawn up according to the Form given by the Act (I., 1, 2, 3), and (K., 1, 2, 3). A minute of the order on conviction, or a memorandum thereof, should at once be made and entered in a separate book kept for that purpose; or if no such book be kept, nor any book of the proceedings where such entry can be made, it should be written either on a separate paper, and annexed to the information or complaint, or on the back of the information, complaint, summons, or warrant, and signed by the convicting Justice or Justices, so that any Justice might thereupon enforce the adjudication. As has been observed, however, it is very desirable that all the proceedings should be entered in a book, from their commencement to their close. "It will, of course," says Mr. Saunders, "not escape the attention of Justices, that this clause (the 17th) will not apply to convictions or orders upon Acts subsequently passed, if these Acts themselves contain the requisite Forms."

The general applicability of these Forms has since been decided in several cases.

§ VII.—OF CONVICTIONS.

Convictions, Requisites of.—The requisites of the conviction, which should include all the defendants convicted at the same time of the same

charge, are, in addition to those before referred to in regard to the *information*, as to the description of the Justices, the offence, with date, &c., principally in regard to the mode of stating the judgment in the adjudicating portion, which must be precise and certain, (*R. v. Harris*, 7 T. R., 238), and must strictly follow the provisions of the Act of Parliament upon which it is provided; for any excess, diminution, or variation of the penalty or punishment and costs fixed by the Statute, but not of their application, (*Charter v. Graeme*, 13 Q. B., 216; and see 17 Vic., No. 39, s. 16), will render the conviction entirely void. The Form need not, in all cases, be followed *verbatim*; for such alterations as are requisite may be made. (*In re Boothroyd*, 15 M. & W., 1). It seems now, since only one offence can be inserted in the information, that the conviction upon which it is founded should likewise contain one offence, although, before the Statute, it was legal to include several offences of the same nature in the same conviction; (Paley, 4th ed., 218); but if several are inserted, each must be distinctly charged, and the penalties must be properly adjudged; (*Newman v. Bendyshe*, 10 A. & E., 11); and Jervis's Statute contains no provision prohibiting the joinder of offences in the same conviction.

Separate convictions are recommended, because of the complicated nature of the adjudication of the imprisonment on non-payment.

A conviction for trespassing in search of game in the day-time, under 1 & 2 W. IV., c. 32, s. 30, included four persons, and adjudicated "that each of them, J. C., J. B., W. W., and J. S., so making default, should be imprisoned for one month, unless the said several sums, and the costs and charges of conveying each of them, J. C., J. B., W. W., and J. S., so making default to gaol, should be sooner paid." Held, that it made each to be imprisoned until the costs of conveying all to gaol had been paid, and therefore was bad, inasmuch as 11 & 12 Vic., c. 43, s. 23, only made each liable for the costs of conveying him to gaol. (*R. v. Cridland*, 3 Jur. N. S., 1213, Q. B.)

Meaning of Month.—As to the term of imprisonment, it may be observed, that some Statutes mention *month*, others "calendar month." It was formerly important to bear this distinction in mind, (as in the former case a lunar month of 28 days was intended), but now, by 16 Vic., No. 1, (which appears to be both retrospective and prospective), a month in all Acts means a calendar month, unless words are added showing that lunar month is intended.

Conviction not usually drawn up at time of giving the decision.—The formal record of conviction is seldom drawn up at the time the decision is actually made against the defendant; but a minute of memorandum of the terms of the judgment or decision is entered by the Clerk upon the minutes of proceedings, and the conviction is itself drawn up subsequently by the Clerk at his leisure. (See 17 Vic., No. 39, s. 9).

Considerable latitude has always been allowed to Magistrates, as to the time and mode of drawing up their formal conviction. Thus, where an informal conviction has been signed and handed over to the defendant, and even carried into execution by distress and imprisonment, it has been held that Justices may at any time before the trial of an action of trespass for the distress or commitment, draw up and sign a more formal conviction.

tion, so that it agreed with the actual proceedings as they occurred before the Justices; and such formal conviction may be produced upon the trial, so as to supersede the one originally given to the defendant, and a good defence to the action may be thereby set up and established. But, after the conviction has been quashed on appeal, the convicting Justice cannot protect himself by drawing up a more formal one, nor can he do so after the defendant taken under a warrant founded on a defective conviction, has been discharged on *Habeas Corpus*. (*Chaney v. Payne*, 1 Q. B., 712).

Where a prisoner had been lodged in gaol under a bad warrant of commitment, a good warrant subsequently delivered to the Gaoler, but before a rule for a *Habeas Corpus* had been obtained, was held to be a good answer to that rule. (*Ex parte Cross*, 26 L. J. M. C., 201, confirming *R. v. Richards*, 5 Q. B., 926).

Upon the trial of an appeal against a conviction, the Court of Quarter Sessions must proceed on the conviction returned to it in the regular way by the Clerk of the Petty Sessions, without paying any regard to a former one which may have been erroneously given to a defendant, with mistakes in matter of form.

Description of Offence].—A few cases are given at greater length, from which the Magistrate will learn what care is required in describing the offence in summary convictions and commitments. The first case has been already referred to, (p. 217).

A return to a *Habeas Corpus ad subjiciendum* set forth a document, being a conviction and committal under Stat. 4 G. IV., c. 34, s. 3, which recited an information and complaint by the agent of D., that the prisoner had contracted to serve D. for a term, and did, before the contract was completed, *absent himself from his service*, and did *thereby, then and there, neglect to fulfil the same, contrary to the form of the Statute, &c.* (*In re Seth Turner*, 9 Q. B., 80). And the document added: "therefore it manifestly appearing to me" (the Justice) that the prisoner "is guilty of the said offence charged upon him in the said information and complaint, I do hereby convict him of the offence aforesaid, and I do hereby order and adjudge that" the prisoner, "for the offence aforesaid, be imprisoned," &c. Upon motion to discharge the prisoner, it was held, that the information showed no offence, as there might be some lawful excuse for the absence, though the Statute simply makes the party's absenting himself from service the ground of complaint, and that the conviction therefore was bad. "The information," said Patteson, J., "does add that the prisoner did, by absenting himself from service, 'thereby neglect to fulfil the same,' contrary to the Statute; but that is not a direct charge; it is only an *inference from what precedes*; if the absenting does not constitute an offence as laid, the inference is not warranted. It therefore comes to this,—whether it is necessary to negative lawful excuse? I think it is, and that the absence must be shown to be wilful, or without lawful excuse. As this information is framed, it would have been proved by showing that the prisoner had stayed away because he had broken his leg."

In *Lindsay v. Leigh*, (11 Q. B., 455), an action of trespass for false imprisonment was brought against a Magistrate, for committing the

as to give the party distrained upon sufficient time to turn about him, and procure the means of payment. (*Jones v. Johnson*, 20 L. J. M. C., 11).

The constable is bound, at the time assigned for the return of the warrant, to certify to the Justice what he has done upon it; but no time is now limited for its return; he should, therefore, make his return within a reasonable time after its execution. (Paley, 265).

Mandamus for enforcing Summary Conviction discretionary].—The Court has a discretion as to granting a writ of *mandamus* commanding Justices to issue a warrant for enforcing the punishment of a person summarily convicted before them. (*Ex parte Robert Thomas*, 16 L. J. M. C., 57; Paley, 256).

One Justice may enforce all Convictions and Orders].—One Justice may issue all warrants of distress or commitment after the determination of any case; and it shall not be necessary that such Justice shall be the Justice, or one of the Justices, by whom the said case shall be heard and determined. (S. 29).

It must be observed, generally, that the penalty, costs of conviction, or term and manner of imprisonment to be enforced or imposed, is such as the Statute upon which the conviction or order is founded directs, and the same as previously adjudged by the convicting Justice or Justices; and no greater or other can be enforced than that which formed the original adjudication upon the information or complaint.

Of the Form of commitment to prison].—The warrant of commitment, whether for an absolute term of imprisonment, in default of payment of a penalty, or in default of distress for same,—must in all cases be in writing; (2 Hawk., c. 16, s. 13, p. 179; *Hutchinson v. Lowndes*, 4 B. & Ad., 118); but a verbal order to detain a defendant until it is made out will be sufficient. The cause of the commitment must be stated with clearness, and it must be shown that the complaint was one over which the Justice had jurisdiction; (*R. v. King*, 13 L. J. M. C., 43; *Johnson v. Reid*, 6 M. & W., 124; *R. v. Chaney*, 6 Dowl., 281; *Re Peerless*, 1 Q. B., 143); and it must state specifically that the defendant was convicted of the offence, which fact must not be left to inference. (*R. v. Rhodes*, 4 T. R., 220; *R. v. Cooper*, 6 T. R., 509). So, too, there must be no ambiguity in the description of the offence, but it must be stated with certainty, as has already been referred to in the remarks relating to the information; and it must correspond with the conviction in every material particular; for if it show an offence of a different nature, it will be bad; (*Rogers v. Jones*, 3 B. & C., 409; *Wood v. Fenwick*, 10 M. & W., 195; *Daniel v. Phillips*, 1 Cr. M. & R., 662; *Charter v. Greame and another*, 18 L. J. M. C., 73); and it must be precise as to the time and manner of the defendant's imprisonment, and of the conditions of his discharge, (*Groome v. Forrester*, 5 M. & S., 314; and Paley, 285), for if it be bad in part, it is in most instances bad in toto; (Paley, 289); and see *ex parte Allison*, 24 L. J. M. C., 73; *Eggington v. Mayor, &c., of Lichfield*, 24 L. J. Q. B., 360, as to the Forms of commitment in Jervis's Act being sufficient in all cases of summary conviction. (Oke's S., 120).

Provisions as to commitment not being void for defects].—It may here be observed, that by some Acts of Parliament, as the 7 & 8 G. IV., c. 29, s. 73,—c. 30, s. 39; 9 G. IV., c. 31; 1 & 2 W. IV., c. 32, s. 45, and

some others, it is provided that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same; but it will be observed from the above, that the commitment must not differ from the conviction. There is no general enactment upon the subject, and a good conviction will not help a bad warrant, where the Statute providing for the proceedings does not contain such a clause. (*Wickes v. Clutterbuck*, 2 Bing., 483). In *R. v. Richards and others*, 5 Q. B., 926, it was admitted in argument, that a Justice may substitute at the prison a good warrant of commitment for a defective one. (Oke, s. 122; and *ex parte Cross*, 26 L. J. M. C., 201).

Time from which the imprisonment runs].—In *Fletcher's case*, (13 L. J. M. C., 16), it was decided, that the warrant of commitment having omitted the date when it was granted, the imprisonment was held illegal, for it was uncertain when it should commence; but in *R. v. Bowdler*, (12 Q. B., 612, 619; 17 L. J., Q. B., 245), this case was overruled on this point, and the imprisonment held to run from the time of the defendant being arrested under the commitment, and not from the date of it or the conviction. See also *ex parte Foulkes*, 15 M. & W., 612; *Braham v. Joyce*, 4 Exch., 487; *Hayes v. Keene*, 21 L. J. C. P., 204; *Mayhew v. Parker*, 8 T. R., 110. (Oke, s. 122).

Where several offenders, a separate commitment is recommended].—The observations before, at p. 236, should be considered when granting a warrant of commitment against several offenders. Strictly, there should be a separate commitment for each defendant where more than one is convicted upon a joint or several offence, or where they are not all sent to gaol on the same day, as well as where the punishment is different to each. It might recite that A. B. was convicted, for that he the said A. B., “together with C. D. and another, (or, others),” did so-and-so, “and it was thereby adjudged that the said A. B. for his said offence should, &c.,” and then proceed in the same way as if A. B. were the only person convicted. See *R. v. Cridland*, 3 Jur. N. S., Q. B., 1213, cited before.

Discharge of defendant on payment of sum adjudged, or otherwise].—On payment of the amount mentioned in a warrant of commitment or distress, with the expenses, the constable must cease to execute it, (ss. 28, 31); but after committal to prison, the same must be paid to the Gaoler, who will discharge the defendant, if he be in his custody for no other matter, (s. 28), such as under a commitment for a consecutive period for another offence, &c. There seems to be no objection, where more convenient, to the committing Justice or the Clerk's receiving the amount after committal, in which latter case the Justice should issue a *liberate* (see Part II.) or discharge to the Gaoler, stating that the condition of the commitment has been complied with. On no other ground can a Justice order a person committed to prison on a summary conviction to be liberated, (except where the particular Statute authorizes it, as 7 & 8 G. IV., c. 29, s. 68,—c. 30, s. 34, where the Justice convicting may discharge the offender from his conviction on making satisfaction to the party aggrieved for damages and costs, or either of them, without payment of the fine adjudged). No portion less than the whole amount adjudged to be paid should be received, nor by instalments, for if it becomes necessary to issue the commitment,

what has been received must be refunded to the defendant. (Oke, s. 123). See Stone's Manual, p. 280.

No demand of penalty necessary before enforcing it].—Some doubts have arisen whether a distress warrant or commitment could issue forthwith upon a conviction being made under the provisions of Jervis's Acts, where the defendant did not appear on the hearing and determination of the case, without a demand being first made of the amount of penalty, &c.; but, as the present Statute, 11 & 12 Vic., c. 43, contains no provision (and in this it differs from the old Act, 5 W. IV., No. 22, see p. 244), on the subject, except as requiring a copy of the minute of an *Order* to be first served, (s. 17), it would seem that no such demand is necessary upon a conviction; (see *ex parte Edwards*, 8 D. & Ry., 115; *Wooton v. Harvey*, 6 East, 79; *Barnes v. White*, 1 C. B., 192, 205, 210; and *Paley*, 253, 256); neither does notice of the conviction appear to be necessary when it takes place in the defendant's absence.

Where time is given, Proof of non-payment].—Where time is given for the payment of a penalty, &c., it would be advisable for the constable to make an affidavit of the non-payment, before issuing the commitment or distress warrant.

Where Imprisonment only is adjudged].—In the case of absolute imprisonment being adjudged for the offence, as no time is given, the defendant should be ordered into the custody of some constable immediately on conviction. By s. 24, defendant is to be committed forthwith; the costs are to be levied separately; and, in default, additional imprisonment. If the defendant, at the time of the conviction, confess he has no goods, or that fact appear to the Justices, or that the distress for the costs would be ruinous to him, as provided by s. 19, he may be committed forthwith for the additional term for these costs, without issuing the distress warrant; the Form of conviction, (I. 3.), it will be seen, provides for such an event, and is a sufficient authority for such a committal; but it should be by a separate warrant of commitment. No Form of commitment on confession of no goods by the defendant, or where the distress would be ruinous, is given by the Statute; but one will be found among the Forms given in this volume, *post*, Part II.

It may be added, that it is fully settled that, by the words in an Act of Parliament authorizing the penalty "to be levied by distress," is to be understood distress *and sale*. (*Paley*, 264). S. 20 authorizes the detainer of the defendant, unless security be given by him, until return of distress warrant.

Costs to be definitely adjudged].—If the conviction do not adjudge costs, a distress warrant cannot issue for them. (*Leary v. Patrick*, 15 Q. B., 266); and see s. 18.

Effects of Partners, defendants].—If the penalty be recoverable by distress against offenders who are partners, the constable may, it is conceived, seize both the joint and separate effects, or either, as on a levy by the Sheriff, each party being answerable for the whole, and not merely for a proportionate part. (*Abbott v. Smith*, 2 Wm. Bla., 947).

Defendant may replevy].—It has been decided by the Court of Exchequer, (*George v. Chambers*, 11 M. & W., 149), that replevin will lie for goods taken under a distress warrant founded on a conviction. See *Paley*, 263, 264.

If a *feme covert* be found guilty of an offence, and the penalty is authorized to be recovered by distress and sale of the offender's goods, she must undergo the imprisonment awarded, as the penalty, &c., cannot be levied on the goods of the husband. (*R. v. Johnson*, 5 Q. B., 335; Paley on Conv., 4th ed., p. 260).

In default of sufficient distress, s. 21 provides that the defendant may be imprisoned and kept to hard labour, in such manner and for such time as shall have been directed and appointed by the Statute on which the conviction or order was founded, unless "the sums adjudged to be paid, and all costs and charges of the distress, and also the costs and charges of the commitment and conveying the defendant to prison, if such Justice shall think fit so to order, (the amount thereof being ascertained and stated in such commitment,) shall be sooner paid."

Where no further remedy is provided by the Statute authorizing the distress in case there is no sufficient distress, the defendant may be committed for not exceeding three calendar months, unless the penalty and costs be sooner paid. (S. 22). No power is given to add hard labour to the imprisonment warranted by this section.

It appears that where the Statute creating the offence does not itself authorize the recovery of the fine either by distress or imprisonment, the only mode of recovery provided by Jervis's Act is by distress (under s. 19); and, if such distress is ineffectual, no further procedure by imprisonment is lawful. (q) The remedy by imprisonment given by s. 22, does not apply to such cases.

It may be added that, under many of the former Statutes, the proceedings were regulated by 5 W. IV., No. 22, (the Summary Procedure Act of 1835); this Act is *not* repealed by the Justices' Act of 1850, (14 Vic., No. 43; see "Justices," No. 4), which adopts Jervis's Acts, (11 & 12 Vic., cc. 42, 43, and 44). The procedure of the Act of 1835 is specifically adopted by the Postage Act, (15 Vic., No. 12; see "Postage"), passed one year subsequently to the introduction of Jervis's Acts; (*quære*, whether it was an oversight, or in consequence of the excluding operation of s. 35 of 11 & 12 Vic., c. 43); and its provisions may be properly adopted in those numerous cases where the Statute authorizing the fine provides no mode of enforcing it, and where it is considered that the remedy

(q) Mr. Arnold's new Book on "Summary Convictions" has now arrived in the Colony, and from it (p. xxvii.) the Editor learns that an Act, to the effect above stated, has passed the Imperial Parliament. (21 & 22 Vic., c. 73, s. 5). It is as follows:—

"Section 22 of 11 & 12 Vic., c. 43, shall extend and be deemed to have extended to all cases in which it is returned to a warrant of distress issued under the authority of such Act, for levying any penalty, compensation, or sum of money adjudged or ordered to be paid by any conviction or order, that no sufficient goods of the party against whom such warrant was issued can be found, where the Statute on which the conviction or order was founded provides no mode of raising or levying such penalty, compensation, or sum of money, or of enforcing payment of the same, as well as to cases where the Statute on which the conviction or order is founded authorizes the issuing thereon of a warrant of distress."

A similar Act, extending the operation of s. 22, and repealing the limitation of s. 35, ought to be introduced into the Colonial Parliament. (See "Abattoir," (Note A), p. 1. The Magistrates' course would then be free from perplexity, and the procedure would in all cases be uniform.

by distress under s. 19 is not sufficient,—at any rate, until an Act of the Legislature is passed to remedy the defect. It is sufficient to call attention to the lucid and elaborate judgment of the Chief Justice, in *ex parte* Cockburn, delivered in July, 1857,—*post* Part III. It is to be remembered, also, that s. 35 excludes from the operation of Jervis's Acts a certain class of cases,—revenue, postal, bastardy, &c. In all such cases, the procedure to be followed by the Justices is such as would have been followed by them if Jervis's Acts had never been adopted. It follows, therefore,—1. That in cases (revenue, &c.) within s. 35, such procedure must be adopted as would have been followed if Jervis's Acts had never been passed; (see “Distillers,” “Bastard”); 2. That in cases where the Statute *creating the offence* gives no power of distress or imprisonment, the former procedure may be adopted, or a distress warrant may issue under s. 19 of Jervis's Act; 3. In all other cases, the procedure of Jervis's Act should be followed.

The following are the words of this Statute (5 W. IV., No. 22, s. 1):—

“That in all cases wherein, by any Act or Acts heretofore made and passed, or hereafter to be made and passed, any proceeding shall have been or shall be or is by this Act directed to be had, or matter authorized to be heard and determined by or before one Justice, or by or before two or more Justices, in a summary way, (and no particular mode of proceeding shall have been or shall be by any such Act directed in that behalf), it shall be lawful for any one Justice to receive the original information or complaint, and to issue the summons or warrant requiring the parties and witnesses to appear before himself, or before any two or more Justices, as the case may require; and upon the appearance of the defendant, or his or her contempt by not appearing after having been duly summoned in manner hereinafter mentioned, and after sufficient time for his or her appearance, and proof thereof on oath to the satisfaction of the Justice or Justices, as the case may be, such Justice, or any two or more Justices, (as the case may require), shall and may proceed to examine into and hear and determine the matter in a summary way, and examine upon oath all necessary witnesses produced, and give his or their judgment thereon; and in case such Justice or Justices shall convict the defendant, and award against him or her any fine or pecuniary penalty, and he or she shall neglect to pay the same fine or penalty together with the costs and charges of and attending such conviction, to be assessed and ascertained by the said Justice or Justices, into the hands of the said convicting Justice, or one of the said convicting Justices, (in case there shall have been more than one such Justice), within one week next after such conviction, (without any previous demand of such penalty), then it shall be lawful for such Justice or Justices, or either of them, or for any other Justice of the Peace, (at his or their discretion), to cause such fine or penalty and costs and charges to be levied by distress and sale of the goods and chattels of the offender, the overplus, after deducting the charges of such distress and sale, to be rendered to the said offender: Provided that if upon the return of the officer charged with the execution of the said distress, it shall appear that no sufficient distress can be found, or the party adjudged to pay any money shall at the time of the said adjudication or conviction declare that he or she has no goods or chattels on which the said distress

can be levied, then the convicting Justice or Justices, or either of such Justices, or any other Justice of the Peace, may, by warrant, commit such offender to one of Her Majesty's gaols, there to remain for any time not exceeding fourteen days from the time of such commitment where the whole sum to be levied and remaining unpaid together with the costs shall not exceed ten shillings; one calendar month, where the said sum and costs shall not exceed one pound; two calendar months, where the said sum and costs shall not exceed five pounds; and three calendar months, where the said sum and costs shall be of any greater amount, unless the said sum to be levied, together with the costs, shall be sooner paid."

It thus appears that the defendant is to be allowed a week to pay the fine, during which time the warrant of distress should remain in the Police Office; and the regulated imprisonment cannot be awarded until after the return of the warrant of distress.

With reference to orders, not convictions, the latter part of s. 17 enacts—"That in all cases where, by any Act of Parliament, authority is given to commit a person to prison, or to levy any sum upon his goods and chattels by distress, for not obeying any order of a Justice or Justices, the defendant shall be served with a copy of a minute of such order (x) before any warrant of commitment or distress shall issue in that behalf; and such order or minute shall not form any part of such warrant of commitment or of distress. These minutes may be filled up at the hearing, and served on the defendant, if he appears, before leaving the Court; but, says Mr. Oke, "if he does not appear, it should be issued in duplicate, and served by the constable, either personally or at his abode; see Form (K. 3.), where this mode of service is stated, and seems, therefore, part and parcel of the enactment. No time of service is required, and no proof of service seems necessary before warrant of commitment or of distress issues. As all sums are to be paid to the Clerk to the Justices, (s. 31), he seems the proper person to sign the minute."

An order may be bad in part, and bad for the residue; (*R. v. Green*, 20 L. J. M. C., 168); it must be drawn up before it is acted upon, and a second order cannot, like a conviction, be drawn up and substituted for one which is found to be defective or informal. (*R. v. JJ. of Cheshire*, 5 B. & Ad., 439).

For proceedings to obtain a Prohibition, *Habeas Corpus*, &c., see "Justices," No. 4.

Costs].—Under s. 18, the Justices are empowered to include in convictions or orders an adjudication as to costs; but they must fix the amount for themselves, and cannot delegate to their clerk or any other person to fix the amount. (*Selwood v. Mount*, 1 Q. B., 726; *Lock v. Selwood*, 1 Q. B., 736). As to appeals, see "Appeal."

(x) For a Form of this minute, adapted to each description of order, (for the section does not at all apply to a conviction), see Part III.

JUSTICES.

No. 3.

ANNO UNDECIMO ET DUODECIMO VICTORIÆ REGINÆ.—CAP. XLIV.

An Act to protect Justices of the Peace from vexatious Actions for acts done by them in execution of their office. [14th August, 1848].

I. *For an act by a Justice of Peace within his jurisdiction, the action shall be on the case, and it shall be alleged to have been done maliciously, and without probable cause*.—Whereas it is expedient to protect Justices of the Peace in the execution of their duty: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That every action hereafter to be brought against any Justice of the Peace for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant.

II. *For an act done by him without jurisdiction or exceeding his jurisdiction, an action may be maintained without such allegation; but not for an act done under a conviction or order, until after such conviction or order shall have been quashed; nor for an act done under a warrant to compel appearance, if a summons were previously served and not obeyed*.—And be it enacted, That for any act done by a Justice of the Peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such Justice in any such matter, may maintain an action against such Justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause: Provided nevertheless, that no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed, either upon appeal or upon application to Her Majesty's Court of Queen's Bench; nor shall any such action be brought for anything done under any such warrant which shall have been issued by such Justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or

most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such Justice for anything done under such warrant.

III. *If one Justice make a conviction or order, and another grant a warrant upon it, the action must be brought against the former*].—And be it enacted, That where a conviction or order shall be made by one or more Justice or Justices of the Peace, and a warrant of distress or of commitment shall be granted thereon by some other Justice of the Peace *bonâ fide* and without collusion, no action shall be brought against the Justice who so granted such warrant by reason of any defect in such conviction or order, or for any want of jurisdiction in the Justice or Justices who made the same, but the action (if any) shall be brought against the Justice or Justices who made such conviction or order.

IV. *No action for issuing a distress warrant irregularly.—No action in the exercise of discretionary power*].—And be it enacted, That where any poor rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the Justice or Justices who shall have granted such warrant by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein; and that in all cases where a discretionary power shall be given to a Justice of the Peace by any Act or Acts of Parliament, no action shall be brought against such Justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power.

V. *If a Justice refuse to do an act, the Court of Queen's Bench may by rule order him to do it, and no action shall be brought against him for doing it*].—And whereas it would conduce to the advancement of Justice, and render more effective and certain the performance of the duties of Justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such Justices might be considered and adjudged by a Court of competent jurisdiction, and such Justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him: Be it therefore enacted, That in all cases where a Justice or Justices of the Peace shall refuse to do any act relating to the duties of his or their office as such Justice or Justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a Rule calling upon such Justice or Justices, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such Rule good cause shall not be shown against it, the said Court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said Justice or Justices upon being served with such Rule absolute shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such Justice or Justices for having obeyed such Rule, and done such act so thereby required as aforesaid.

VI. *After conviction or order confirmed on appeal, no action to be brought*].—And be it enacted, That in all cases where a warrant of distress

or warrant of commitment shall be granted by a Justice of the Peace upon any conviction or order which, either before or after the granting of such warrant, shall have been or shall be confirmed upon appeal, no action shall be brought against such Justice who so granted such warrant for anything which may have been done under the same by reason of any defect in such conviction or order.

VII. *Actions may be set aside where by this Act prohibited*].—And be it enacted, That in all cases where by this Act it is enacted that no action shall be brought under particular circumstances, if any such action shall be brought it shall be lawful for a Judge of the Court in which the same shall be brought, upon application of the defendant, and upon an affidavit of facts, to set aside the proceedings in such action, with or without costs, as to him shall seem meet.

VIII. *Limitation of actions*].—And be it enacted, That no action shall be brought against any Justice of the Peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of shall have been committed.

IX. *Notice of action*].—And be it enacted, That no such action shall be commenced against any such Justice of the Peace until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his Attorney or Agent, in which said notice the cause of action, and the Court in which the same is intended to be brought, shall be clearly and explicitly stated; and upon the back thereof shall be endorsed the name and place of abode of the party so intending to sue, and also the name and place of abode or of business of the said Attorney or Agent, if such notice have been served by such Attorney or Agent.

X. *Venue.—Defendant may plead the general issue, and special matter, &c., in evidence*].—And be it enacted, That in every such action the venue shall be laid in the county where the act complained of was committed, or in actions in the County Court the action must be brought in the Court within the district of which the act complained of was committed; and the defendant shall be allowed to plead the general issue therein, and to give any special matter of defence, excuse, or justification in evidence under such plea, at the trial of such action: Provided always, that no action shall be brought in any such County Court against a Justice of the Peace for anything done by him in the execution of his office if such Justice shall object thereto; and if within six days after being served with a summons in any such action such Justice, or his Attorney or Agent, shall give a written notice to the plaintiff in such action that he objects to being sued in such County Court for such cause of action, all proceedings afterwards had in such County Court in any such action shall be null and void.

XI. *Tender and payment of money into Court*].—And be it enacted, That in every such case after notice of action shall be so given as aforesaid, and before such action shall be commenced, such Justice to whom such notice shall be given may tender to the party complaining, or to his Attorney or Agent, such sum of money as he may think

fit as amends for the injury complained of in such notice; and after such action shall have been commenced, and at any time before issue joined therein, such defendant, if he have not made such tender, or in addition to such tender, shall be at liberty to pay into Court such sum of money as he may think fit, and which said tender and payment of money into Court, or either of them, may afterwards be given in evidence by the defendant at the trial under the general issue aforesaid; and if the jury at the trial shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered or paid into Court, or beyond the sums so tendered and paid into Court, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuit, and the sum of money, if any, so paid into Court, or so much thereof as shall be sufficient to pay or satisfy the defendant's costs in that behalf, shall thereupon be paid out of Court to him, and the residue, if any, shall be paid to the plaintiff; or if, where money is so paid into Court in any such action, the plaintiff shall elect to accept the same in satisfaction of his damages in the said action, he may obtain from any Judge of the Court in which such action shall be brought an order that such money shall be paid out of Court to him, and that the defendant shall pay him his costs to be taxed, and thereupon the said action shall be determined, and such order shall be a bar to any other action for the same cause.

XII. *In what cases nonsuit, or verdict for defendant*.—And be it enacted, That if at the trial of any such action the plaintiff shall not prove that such action was brought within the time hereinbefore limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, or if he shall not prove that such cause of action arose in the county or place laid as venue in the margin of the declaration, or (when such plaintiff shall sue in the County Court) within the district for which such Court is holden, then and in every such case such plaintiff shall be nonsuit, or the jury shall give a verdict for the defendant.

XIII. *Damages*.—And be it enacted, That in all cases where the plaintiff in any such action shall be entitled to recover, and he shall prove the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he prove that he was imprisoned under such conviction or order, and shall seek to recover damages for any such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of two-pence as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was so ordered to pay.

XIV. *Costs*.—And be it enacted, That if the plaintiff in any such action shall recover a verdict, or the defendant shall allow judgment to pass against him by default, such plaintiff shall be entitled to costs in such manner as if this Act had not been passed; or if in such case it be stated

in the declaration, or in the summons and particulars in the County Court if he sue in that Court, ~~that~~ the act complained of was done maliciously and without reasonable and probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit, to be taxed as between attorney and client; and in every action against a Justice of the Peace for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client.

XV. *Extent of Act.*

XVI. *Commencement of Act.*

XVII. *After commencement of this Act the following Statutes or parts of Statutes repealed:—7 Jac. I., c. 5; 21 Jac. I., c. 12, s. 5; 24 G. II., c. 44, ss. 1, 2, and part of s. 8; 43 G. III., c. 141,—so far as they relate to actions against Justices.*

XVIII. *Act to apply to persons protected by the repealed Statutes].—*And be it enacted, That this Act shall apply for the protection of all persons for anything done in the execution of their office, in all cases in which, by the provisions of any Act or Acts of Parliament, the several Statutes or parts of Statutes hereinbefore mentioned and by this Act repealed would have been applicable if this Act had not passed.

XIX. *Act may be amended, &c.*

SUMMARY.

(11 & 12 VIC., c. 44).

PROTECTION TO JUSTICES.

The third of Jervis's Acts, adopted by the Colonial Act, has for its object and title the "Protection of Justices of the Peace from vexatious actions for acts done by them in execution of their office." In addition to this Act, the 14th section of the Colonial Act 14 Vic., No. 43, s. 14, (see, *post*, "Justices," No. 4), contains an enactment prohibitory of any action being brought at all, where a rule or order to show cause shall have been obtained under the previous clauses, even though it should be subsequently discharged.

The provisions of Jervis's Act are classified by Mr. Oke as follows:—

1. No action is to be brought unless commenced within six calendar months next after the act complained of is committed, (s. 8); and one calendar month's notice, in writing, of such action is to be given to the Justice, either personally, or left at his abode. (S. 9).

2. After notice of action given, and before it is brought, defendant (the Justice) may tender amends; or after action brought, and before issue joined, pay money into Court. If no more damage proved, a verdict to pass for defendant, and so much of the sum paid in as the defendant's costs amount to, to be paid out of Court to the defendant; and if the amount exceeds the defendant's costs, the residue is to be paid to the plaintiff. If plaintiff elect to accept the sum paid in, in satisfaction of

damages, a Judge to grant an order to that effect, and that defendant shall pay the plaintiff's taxed costs, and the action be determined. (S. 11.)

3. The *onus* of proof of due notice of action,—of action brought within the time limited,—of the cause of action stated in the notice,—and that it arose in the county laid as venue, to lie on the plaintiff;—in either case, if no proof, the plaintiff to be nonsuited, or a verdict for the defendant. (S. 12).

4. The venue is to be laid in the county where the act complained of was committed, or,—if in the County Court,—in the district; and the defendant may plead the general issue, and give any special matter in evidence under such plea; but no action is to be brought in any such County Court if the Justice object thereto; and if, within six days after being served with a summons, such Justice, or his Attorney or Agent, shall give written notice to the plaintiff that he objects to being sued in such Court, all proceedings afterwards had in such Court shall be null and void. (S. 10).

5. No action to be brought for the manner in which a Justice shall exercise a discretionary power given him. (S. 4).

6. If a Justice refuse to do an act, the Court of Queen's Bench may, by rule grounded on an affidavit of the facts, order him to do it, and no action shall be brought against him for doing it. (S. 5).

7. If an action be brought where by this Act it is prohibited, a Judge may set aside the proceedings. (S. 7.)

8. For an act done by a Justice in the execution of his duty as such Justice, with respect to any matter within his jurisdiction, the action shall be on the case; and it shall be expressly alleged in the declaration that such act was done maliciously, and without reasonable and probable cause. (S. 1).

9. For an act done by a Justice without jurisdiction, or exceeding his jurisdiction, (see *Leary v. Patrick*, 19 L. J. M. C., 211; and *Barton v. Bricknell*, 20 L. J. M. C., 1, *infra*), any person injured thereby, or by any act done under any conviction or order made, or warrant issued by such Justice thereon, may maintain an action in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause, (s. 2); but see proviso in Nos. 11 & 12, *post*.

10. If the act complained of is shown to have been done maliciously, and without reasonable and probable cause, and a verdict is given against the Justice, or if judgment by default, full costs of suit follow; and where there is a verdict for the Justice, he is to have his costs, as between Attorney and client, (s. 14). *Vide* No. 16, *post*, where the plaintiff is not entitled to any costs.

The particular provisions of the Statute 11 & 12 Vic., c. 44, which, in addition to the general provisions above noticed, are applicable more immediately to the acts of Justices in matters within their cognizance, are as follows:—

11. No such action (for an act done *without* or *exceeding* his jurisdiction, as in No. 9, *supra*), shall be brought for an act done under a conviction or order, until after such *conviction* (the words "*or order*" must be here

inserted to give effect to the meaning, *Ratt v. Parkinson*, 20 L. J. M. C., 210), shall have been quashed, either upon appeal or by the Court of Queen's Bench.

12. Nor for anything done under a warrant issued to procure the appearance of the party, and which shall have been followed by a conviction or order, until after such conviction or order shall be so quashed.

13. Nor for an act done under a warrant to compel appearance, (if not followed by a conviction or order, or if it be a warrant for an indictable offence), if a summons were previously issued and not obeyed. (S. 2).

14. If one Justice make a conviction or order, and another grant a warrant upon it, *bonâ fide*, and without collusion, the action must be brought against the former, not the latter, for a defect in such conviction or order. (S. 3).

15. After a conviction or order confirmed upon appeal, no action is to be brought against a Justice who granted a warrant of distress or commitment upon it, for anything which may have been done under the same, by reason of any defect in such conviction or order. (S. 6).

16. If the plaintiff in an action is entitled to recover, and shall prove the levying or payment of any penalty or sum of money under any conviction or order as part of his damages, or if he prove that he was imprisoned, and seeks to recover damages for such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond two-pence as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and, (with respect to such imprisonment), that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was ordered to pay. (S. 13).

Decisions of the Court in the Protection of Justices.—Previously to the passing of the Statute 11 & 12 Vic., c. 44, most of the Statutes giving summary jurisdiction contained protective clauses, upon which the most liberal construction was always put by the Courts, particularly as regards the right of Justices and others to notice of action, under the belief that they were acting within the scope of their jurisdiction, or in the exercise of their office. The general rule upon the subject, which is equally applicable now, was thus stated by Lord Campbell in a very recent case, (*Spooner v. Juddow and another*, 6 Moore, Pr. C. Rep., 283):—"There can be no rule more firmly established than that, if Justices *bonâ fide* and not absurdly believe that they are acting in pursuance of Statutes and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act."

The following case is an illustration of the application of the doctrine:—To an action for trespass for assault and false imprisonment, defendant pleaded not guilty (by statute), relying on the Game Act, 1 & 2 W. IV., c. 32, s. 31. The Judge left it to the jury to say whether or not the defendants believed they were acting in pursuance of the Statute, and, if so, whether they had reasonable grounds for so believing. The jury found, that the defendants thought they were acting in pursuance of the Statute, (*Cox v. Reid and another*, 13 Q. B., 558); in consequence of which the

Judge directed a nonsuit, for want of a month's notice of action, according to sec. 47. On a motion for a new trial, on the ground of misdirection, the Court of Queen's Bench held, that the question was properly left to the jury, and that the defendants were entitled to notice, whether the trespass was actually justifiable under the Statute or not.

The doctrine extends also to a person apprehending another under the Malicious Trespass Act, 7 & 8 G. IV., c. 30, (*Horn v. Thornborough*, 3 Exch. R., 846), although not the owner of the property injured, if he causes such apprehension under the *bonâ fide* belief that he is acting in pursuance of the Statute.

In an action against the Judge of a County Court, for making an order after having been served with a writ of prohibition, the Judge at the trial told the jury that, if the defendant acted in the *bonâ fide* belief that his duty made it incumbent on him to do so notwithstanding the prohibition, the act must be considered as "done in pursuance" of the County Courts Act, and that the defendant did "reasonably" believe it was his duty to proceed, if he believed according to his reason, as contra-distinguished from *caprice*. The direction was held by the Court of Common Pleas to be correct. (*Booth v. Clive*, 10 C. B., 827).

Other recent cases on the point are—*Kine v. Evershed*, 10 Q. B., 143, 151, and *Hughes v. Buckland*, 15 M. & W., 346, where most of the previous authorities are cited.

There are many subtle distinctions on this matter, upon which it is not necessary for me to touch; see, for instance, the late case of *Moffatt v. Ross*, which was tried in this Court before Mr. Justice Wise:—The plaintiff sued the defendant for slander; the words complained of had been uttered in the Police Court, where the defendant was sitting as a Magistrate. The defendant's Counsel moved for a nonsuit, on the ground that there had been no notice of action, according to the Statute. Plaintiff's Counsel demurred to the necessity of such notice.

Mr. Justice Wise held, that it was a question for the Judge whether defendant was, at the time of the act done, in the execution of his office;—that, in his opinion, he was in the execution of his office, on any view of the evidence;—that, if the question of *bonâ fides* arose, he was of opinion that it existed so as to bring the defendant within the protection of the Statute as to notice;—that that did not affect the question whether he was justified, or not, in using the words, but only whether he should, if he pleased, have the opportunity of making amends.

It is evident that, in all cases where it is intended to bring an action against persons invested with statutory authority or duties, such as Judges, Justices, constables, &c., on account of any acting in pursuance of a Statute, or in execution of an office, it is most expedient that due notice of the intention to bring such action should be given.

The interpretation of the protective clauses of Jervis's Act, 11 & 12 Vic., c. 44, ss. 1 & 2, has been illustrated in two very recent cases,—(*Leary v. Patrick and another*, 15 Q. B., 266; *Barton v. Bricknell*, 13 Q. B., 393). In the latter, an action of trespass was brought against a Justice for wrongfully seizing plaintiff's goods; the following is the judgment of Coleridge, J.:—

Coleridge, J.:—"This, certainly, is an important case, and I fear I

must also agree that this Statute is exceedingly ill-worded. I think the present case falls within both the words and the intent of section 1. The facts are these: There is an information laid before the Justice; he convicts; he awards a penalty and costs, and orders them to be levied by distress. All this was right, and the Justice so far pursued his jurisdiction. But he added an alternative,—that the plaintiff should be put in the stocks in case the penalty and costs were not paid, or raised by distress. That was beyond his jurisdiction. But the plaintiff was not, in fact, put in the stocks; his goods were seized under a distress, and afterwards the conviction was quashed. Now, it cannot be doubted that the Justice had jurisdiction in everything except the alternative order, and the action is brought, not for putting the plaintiff in the stocks under it, but for doing that which the defendant might have justified if he had drawn up his conviction in proper form. Then we have Stat. 11 & 12 Vic., c. 44, s. 1, which relates to 'actions brought against any Justice of the Peace for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice.' I think words can hardly be found more accurately to describe the act which the defendant has done, and for which this action is brought. But sect. 2 raises a question whether the words in sect. 1 are to have full effect given to them, so as to protect the defendant. The case is within the spirit of the Act, which is one for protection of Justices, and, therefore, assumes that the Justice has been guilty of some irregularity, or he would not need protection. Now, sect. 2 enacts, that 'for any act done by a Justice of the Peace, in a matter of which, by law, he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made, or warrant issued by such Justice in any such matter, may maintain an action against such Justice in the same form, and in the same case, as he might have done before the passing of this Act,' after the conviction has been quashed. I am not prepared to deny that the present case falls within the literal meaning of those words; for this is an act done under a conviction in a matter in which the defendant has exceeded his jurisdiction. But if we give these words their full literal meaning, they contradict the first section. We must then try to construe them so as to give effect to the whole of the Act, and I think we do this if we confine section 2 to cases in which the act by which the plaintiff is injured is an act in excess of jurisdiction: for instance, if the plaintiff in the present case had been put in the stocks under the illegal alternative, and the action had been brought for that, in which case, probably, trespass might have lain; as it is, I think it does not."

The judgments of Mr. Justice Wightman and Mr. Justice Erle are well worthy of attention; a portion of the latter was as follows:—

"The Justice had jurisdiction to convict, and to order payment of the penalty and costs, and to levy them by distress. All these things he had to do in the execution of his duty, and he had jurisdiction to do them. But there was a defect in the conviction, as the Justice ordered an alternative beyond his jurisdiction. If anything had been done in respect of the wrongful order, it would have been an act beyond his jurisdiction; but there was nothing of the sort. It was a mere error as to the manner

in which the conviction should be framed, which caused the Justice to draw it up in a wrong form, and, on account of the formal defect, the conviction was quashed. I think the case is precisely that which section 1 is intended to protect. Then I think the construction of section 2 must be so controlled by section 1 as to be consistent with it; and that is done by so construing section 2 as to confine its application to cases in which the cause of action arises from the excess of jurisdiction, as it would have done in this case if the plaintiff had been put in the stocks, and he had brought the action for that."

In *Kendall v. Wilkinson*, (24 L. J. M. C., 89), an affiliation order had been made on the plaintiff; he gave notice of appeal, and entered into the required recognizances for payment of costs. The Quarter Sessions confirmed the order subject to a case; afterwards, on non-payment of the sum ordered to be paid, a Justice issued a warrant against the plaintiff, (the putative father), to enforce the order. It was held by Coleridge: "That the granting the warrant being for the purpose of a judicial inquiry, whether or not the plaintiff ought to pay the money, was within the Justice's jurisdiction, notwithstanding the pendency of the appeal, and therefore the action was barred by sect. 1, there being no allegation that the act was done maliciously and without reasonable and probable cause."

In a very recent case, (*Bott v. Ackroyd*, 28 L. J. M. C., 207), the defendants convicted the plaintiff in a penalty of £2 and costs, or two months' imprisonment. Against this decision, which was given orally, the plaintiff gave notice of appeal, and immediately left the Court. A conviction and warrant of commitment were afterwards drawn up, in which blanks were left for the amount of costs to be inserted, and so signed by the defendants. These blanks were afterwards filled up by the Justice's clerk, and the plaintiff was arrested on the warrant, when he, for the first time, became aware of the amount of costs. The signing in blank was held to be a mere irregularity and an erroneous exercise of jurisdiction, but not an excess; that it was necessary to prove malice, and that the plaintiff, having brought his action for false imprisonment, was rightly nonsuited under s. 1.

2nd Section.—See, as to the construction of this section, *Leary v. Patrick*, 15 Q. B., 266; *Newbould v. Coltman*, 6 Ex., 189. The summons mentioned in the Statute, the non-attendance upon which is to bar the maintenance of an action, is a summons *before* conviction; the section does not apply to a summons and warrant issued after conviction, with a view to the levying of the penalty imposed. (*Bessell v. Wilson*, 1 El. & Bl., 489).

With regard to this section, (in *Ratt v. Parkinson*, 20 L. J. M. C. 208), Jervis, C. J., says:—"I confess I should be inclined to think that the words "exceeding his jurisdiction," in s. 2, means, assuming to do something which the Act under which he is proceeding could by no possibility justify, as in the case in the Queen's Bench, of *Leary v. Patrick*, where there could be no authority to issue a distress for costs not adjudged by a conviction; or as was in the case of *Barton v. Bucknell*, in which case, there was no power to order the plaintiff to be put in the stocks; but I abstain from pronouncing any opinion on the subject."

5th Section.—The mode of compelling a Magistrate to do any act

which he may have, by virtue of his office, to perform, has hitherto been by *mandamus*, but the 5th section of the Act now under consideration has enabled parties to substitute a much more simple mode of proceeding for a rule calling upon such Justice or Justices, and also the party to be affected by such act, to show cause why such act should not be done; and if, after due service of such rule, good cause shall not be shown against it, the said Court may make the same absolute, with or without payment of costs, as to them shall seem meet; and the said Justice or Justices, upon being served with such rule absolute, shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such Justice or Justices, for having obeyed such rule and done such act so thereby required as aforesaid.

The Court acts upon this section where Justices refuse to determine a case over which they have jurisdiction. (*R. v. Cotton*, 15 Q. B., 569). But it refused to make an order, directing Justices to issue a warrant of distress where the liability of the person against whom it was sought appeared seriously doubtful. (*R. v. Brown*, 13 Q. B., 654). As to costs upon application under the section, see *R. v. Ingham*, 17 Q. B., 884. In *R. v. Paynter*, 26 L. J. M. C., 102, a Magistrate, upon a complaint regularly heard before him, gave his opinion in favour of the defendant, but, at complainant's request, refused to adjudicate, for the purpose of enabling the complainant to obtain the opinion of the Queen's Bench. The defendant objected, and wished the Magistrate to adjudicate and dismiss the complaint. It was held, that there was no such refusal to adjudicate as to entitle the complainant to a rule under section 5.

Crompton, J.:—"The construction contended for would make this Court a Court of advice to Magistrates in every little matter of doubt; I think such is not the intention or meaning of the Act."

8th and 9th Sections].—With regard to the notice required by sections 8 & 9 it may be remarked, that the notice may be given before the quashing of the order, the act complained of being the cause of action, although the action itself cannot be brought until after the quashing. (*Haylock v. Sparke*, 1 El. & Bl., 471).

Protection by Production of Conviction].—It has been already stated that a bad commitment may be cured by a good conviction, either on return to a writ of *Habeas Corpus*, or in action for false imprisonment against the committing Magistrate. Thus, where a party was committed to prison for non-payment of a sum ordered to be paid on conviction under the 7 & 8 G. IV., c. 30, and two convictions were subsequently sent to the Quarter Sessions, it was held, in an action for false imprisonment against the committing Magistrate, that he might defend himself by the second conviction, if it was valid in itself. (*Charter v. Greame and another*, 13 Q. B., 216).

The rule on this subject is thus given by Paley:—"It is established that, in an action against a Magistrate, a subsisting conviction,—good upon the face of it, in a case to which his jurisdiction extends,—being produced at the trial in an action for trespass against the Magistrate by a convicted party, is a bar to the action, provided that the conviction was not made maliciously and without reasonable and probable cause, and provided, also, that the execution has been regular, although the Magistrate

may have formed an erroneous judgment upon the facts, for that is properly matter for appeal." (Paley, 388).

"It is a rule," said Chief Baron Pollock, (*Tarry v. Newman*, 15 M. & W., 658), "that in such action the plaintiff cannot travel out of the conviction, or adduce evidence to contradict it, if it is good on the face of it, though, in appeal to the Sessions, he might have impugned the conclusion of the Magistrate in that matter."

In other words, a conviction by a Magistrate who has jurisdiction over the subject matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it. (*Britain v. Kinnaird*, 1 B. & B., 482). In that case, trespass was brought against Justices for taking a boat; in their defence they relied on a conviction, which warranted them in doing so. The plaintiff offered evidence to controvert facts stated in the conviction, but it was held not to be admissible. The same attribute, viz., that of being conclusive evidence of the facts stated therein, and properly tending thereto, seems to have been thought to belong to every adjudication emanating from a competent tribunal. (*Aldridge v. Haines*, 2 B. & Ad., 395).

From the above remarks it will be seen how broad is the shield thrown by the law over the actings of Magistrates, where they do not spring from corruption, or from error culpably negligent, capricious, or perverse. At the same time, no one should accept the office of Magistrate who is not sensible of both the desire and capacity to attain such a knowledge of his duties as will enable him to perform them with an ordinary degree of security to himself and of satisfaction to the public.

Liability to Action for refusing Bail.—In connection with the subject of actions against Magistrates, *Linford v. Fitzroy*, (15 Q. B., 240), is very important :—An action was brought against a Magistrate for refusing to take bail, and it was held, that it could not be sustained without proof of malice, even though the plaintiff was entitled to bail and had tendered sufficient sureties. The judgment of the Court of Queen's Bench upon the point was thus delivered by Lord Denman :—

"This was an action on the case against the defendant, a Magistrate of the county of Norfolk, for refusing to admit the plaintiff to bail. The declaration stated that the plaintiff was charged with an assault upon a constable in the execution of his duty; that sufficient bail was tendered, but the defendant absolutely, unlawfully, and maliciously, and without reasonable or probable cause or ground whatsoever, refused to accept the security offered, or any other security whatsoever. The jury on the trial negatived *malice*, but found a verdict for the plaintiff. The question therefore is, whether the declaration is good without the allegation of malice, for the effect of the *finding* is to strike out that allegation. This depends upon another question, whether the duty, the breach of which is charged in this declaration, was judicial or ministerial.

"The Statute of *Westminster, the first*, 3 Ed. I., c. 15, provides that, 'If any withhold prisoners replevisable, after that they have offered sufficient surety, he shall pay a grievous amercement to the King.' By the same Statute, offenders declared replevisable are defined, and, amongst others, persons accused of other trespasses (than those specially men-

tioned) 'for which one ought not to lose life nor member.' Some doubt may have existed in early times, whether this definition included all misdemeanors, or only common misdemeanors,—and, if the latter only,—what were common; but for many years the received opinion and practice have been, that all persons accused of misdemeanors, whether common or otherwise, are entitled to be admitted to bail. It is, however, somewhat remarkable that the Legislature, in a late Act of Parliament, 11 & 12 Vic., c. 42, s. 23, has drawn a distinction, and has given authority to Magistrates to admit to bail, *at their discretion*, persons accused of certain specified misdemeanors, (among which is the very one of assaulting a peace officer in the execution of his duty), but has directed that, in all other cases of misdemeanor, Magistrates shall admit to bail.

"Assuming, however, that the plaintiff was entitled to be admitted to bail, what was the nature of the Magistrate's duty who was called upon so to admit him? Clearly, that duty was, to a great extent, judicial; namely, in respect of fixing the amount of bail, and of determining as to the ability of the persons tendered, which two requisites make up the sufficiency. It is, however, contended that, if those requisites exist, the act of admitting to bail becomes ministerial only; that this declaration shows these requisites to have existed, and that the jury have so found; consequently, that nothing remained for the Magistrate to do but to admit to bail, and that his duty had become ministerial; that he refused to perform that duty without reasonable or probable cause, and is, therefore, liable to an action, even in the absence of malice, just as an action will be against a Sheriff for refusing to take bail or grant replevin, or against a Magistrate for refusing to take examinations under the Statute of Hue and Cry. In *R. v. Tracey*, 6 Mod., 179, it was said by the Court; that 'It is an offence in a Justice of the Peace to refuse bail in case of a common misdemeanor; and it suffices to say in the indictment that sufficient bail was tendered, without saying that the party knew them to be sufficient;' and upon that authority, principally, it is that the plaintiff contends that this declaration shows that the defendant's judicial duty was satisfied and at an end, and his ministerial duty only remained to be exercised.

"We have had much doubt and difficulty in coming to a conclusion upon this point; but, upon the fullest consideration, we are of opinion that the duty of the Magistrate in respect to admitting to bail cannot be thus split and divided; that it is essentially a judicial duty, involving inquiries in which discretion must be exercised, and, in some cases of misdemeanor, discretion under circumstances of much nicety; and that we cannot lay down a rule, which is to depend upon the peculiar facts of each case. The broad line of distinction is this,—that, unless the duty of the Magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do anything in execution of that duty, unless he can be fixed with malice, which, in this case, has been negatived by the jury."

JUSTICES.

No. 4.

COLONIAL JUSTICES' ACTS.

(14 VIC., NO. 43; AND 17 VIC., NO. 39).

An Act to adopt and apply certain Acts of Parliament, passed for facilitating the performance of the duties of Justices of the Peace, and for protecting them from vexatious actions; and to prevent persons convicted of offences from taking undue advantage of mere defects or errors in form. [2nd October, 1850].

I. *Preamble.*—11 and 12 Vict., cap. 42, 43, and 44.—*Extension of those Acts.*—Said Acts adopted accordingly].—Whereas three Acts of Parliament were passed in the eleventh and twelfth years of Her Majesty's Reign, of which one is intituled, "*An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales, with respect to persons charged with indictable offences;*" and the second is intituled, "*An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales, with respect to summary convictions and orders;*" and the other is intituled, "*An Act to protect Justices of the Peace from vexatious actions, for acts done by them in execution of their office:*" And whereas the adoption of those several Acts in and for the Colony of New South Wales, would not only tend greatly to the ease of Magistrates in the said Colony, but to the advancement of Justice, in respect of all proceedings by and before them out of Sessions: Be it therefore enacted, by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That from and after the first day of the month of December next, the said three Acts of Parliament, and the several provisions therein contained respectively, shall (so far as the said provisions can be applied) be in force and take effect in New South Wales and its Dependencies, and be applied and enforced in the administration of Justice accordingly; and from and after that date, all Statutes, and parts of Statutes, which by the said recited Acts respectively are repealed in England, and all enactments of or to the like tenor and effect, made and passed in New South Wales, shall in New South Wales, and its Dependencies, be and the same are hereby repealed.

II. *Transmission of Depositions, &c.*—That all informations, depositions, statements, and recognizances, which by the said recited Acts or any of them, are required to be delivered to the officer of the Court in which the trial is to be had, shall, in this Colony, be transmitted by the Justice or Justices, as soon as possible after the conclusion of the case before him or them, to the Attorney General, or (in cases where he shall so require) to the Solicitor General; or, in Port Phillip, to the Crown Prosecutor; and the said Attorney General, Solicitor General, and Crown Prosecutor, shall respectively, after such transmission, and before the day of trial, have and be subject to the same duties and liabilities, in respect of the said several documents, upon a *Certiorari* directed to them respec-

tively, or upon a rule or order directed to them in lieu of that writ, as the Justice or Justices would have had and been subject to, upon a *Certiorari* to him or them, if such documents had not been so transmitted; and the said officers, respectively, or the officer in any case prosecuting for them respectively, shall at any time after the opening of the Court, at the sittings at which the trial is to be had, deliver the said several documents, or any of them, to the proper officer of the Court, if and when the presiding Judge thereat shall so direct.

III. *Rate per folio for copies of depositions*].—That in every case where by the said Acts, or any of them, a party would be entitled to copies of the depositions if committed or held to bail by any Justice or Justices, he shall be entitled to the like copies when committed by any Coroner; and that in every case where any witnesses or witness shall have been cross-examined or called and examined, by or on behalf of the party committed or held to bail, he shall in like manner be entitled to copies of the evidence given on such cross-examination, or examination, and the rate per folio which shall be payable to the Clerk of the Justice or Justices, or Coroner, before transmission of the said documents, or to the Clerk of the Attorney General, Crown Prosecutor, or Crown Solicitor, as the case may be, after their transmission, for copies of the depositions, shall be such (not exceeding four-pence per folio) as the Judges of the Supreme Court shall, from time to time, fix and determine. (11 & 12 Vic., c. 42, s. 27, p. 173, *ante*).

IV. *Power of indorsing warrants*].—That the same power of indorsing warrants shall exist in New South Wales, with respect to offenders out of the jurisdiction of the Justice or Justices granting the same, whether in this Colony or not; and every such warrant, when indorsed, shall have the same validity in this Colony, to the extent of the jurisdiction of the indorsing Justice, and may be acted on in the like manner, as is provided by the first mentioned of the said recited Acts, with respect to warrants granted in England and indorsed by virtue of the same Act in Ireland, and the converse. (11 & 12 Vic., c. 42, s. 12, p. 163, *ante*).

V. *Justices to be deemed Justices for the Colony, unless otherwise indicated*].—That in all cases where, after the commencement of this Act, any Justice shall be described as a Justice of the Peace for the Colony of New South Wales, such description shall be taken to mean that he is a Justice of the Peace for the Colony generally, but not for any such City or Town, unless words indicating that he is a Justice also for such City or Town be added; and that in all cases every act done or purporting to have been done by any Justice of the Peace, either for the Colony, or for Port Phillip, or for any such City or Town, shall be taken to have been within his jurisdiction, without an allegation to that effect, until the contrary be shown. (Amended by 17 Vic., No. 39, s. 12, p. 265, *post*).

VI. *Powers of Police Magistrates*].—That for the purposes of every enactment in the said recited Acts, or any of them, giving certain special powers to Police and Stipendiary Magistrates, every Police Magistrate in this Colony and its Dependencies shall be taken to be included in such enactment. (Repealed by 20 Vic., No. 32, s. 2; and see 17 Vic., No. 39, s. 11, p. 265, *post*).

VII. *Adaptation of Forms*].—That the several Forms annexed to the

two first recited Acts, or any of them, may be varied, for the purpose of adapting the same to the circumstances and condition of this Colony: Provided that it shall be lawful, from time to time, for any three Justices, at the General Quarter Sessions of the Peace holden at Sydney, of which Justices the Chairman shall be one, (or in and for the District of Port Phillip, for any two Justices, at the General Quarter Sessions holden at Melbourne, with the approval of the Resident Judge there), to settle such variations as shall appear to them to be necessary for the purposes of such adaptation; and from and after the publication in the *New South Wales Government Gazette*, (or, at Melbourne, in the usual official newspaper there), of any Form as varied by such Justices, no other variation from the Form prescribed by the Act shall be allowed. (*The Forms given in Part II. were adapted in June, 1851.*)

VIII. *Powers of Supreme Court, and Venue in actions*].—That whenever the Court of Queen's Bench is mentioned in the said recited Acts, or any of them, the Supreme Court of New South Wales shall in and for this Colony be taken to be indicated; and that in all actions where by the last mentioned of the said Acts, the venue is required to be laid in the County where the cause of action arose, it shall be sufficient to lay as the venue the appropriate Circuit Town; and no action shall be brought against any Justice in respect of anything done by him in the execution of his office in any Court of Requests or of Petty Sessions.

IX. *Certain powers given to Supreme Court in respect of Summary Convictions*].—And whereas it would greatly tend to the advancement of Justice, in respect of matters within the summary jurisdiction of Justices of the Peace, and to the protection of Justices in the exercise of that jurisdiction, especially from actions brought against them for or in respect of errors of judgment merely, if power were given to the Supreme Court, in certain cases, to amend defects of form, or mistakes not affecting the substantial merits in the proceedings of such Justices; and on the other hand, if the means of obtaining summary relief were afforded against the summary convictions or orders of Justices: Be it enacted, That after the commencement of this Act, no person brought before the said Court, or any Judge thereof, on *Habeas Corpus*, shall be discharged from custody by reason of any defect, or error whatsoever, in the warrant of commitment of any Justice or Justices, until he or they, (or one of them, where more than one), or the prosecutor, or party interested in supporting such warrant, shall have had notice of the intention to apply for such discharge, and have been required to transmit, and have had the opportunity of transmitting, or causing to be transmitted, to the Court or Judge, the conviction or order, if any, on which the commitment shall have been founded, together with the depositions and information, if any, intended to be relied on in support of such conviction or order, or certified copies thereof; and if any such conviction or order and depositions shall be so transmitted, and the offence charged (or intended in point of fact to have been charged), shall thereby appear to have been established, and the judgment of the Justice or Justices thereupon to have been in substance warranted, the Court or Judge shall allow the warrant of commitment (and the conviction or order also, if such Court or Judge shall think fit), to be forthwith amended in all necessary particulars, in accordance with the facts; and the

person committed shall thereupon be remanded to his former custody. (17 Vic., No. 39, s. 7, p. 264, *post*).

X. *The like in cases of Certiorari*.—That the like proceedings shall be had and the like amendments be allowed to be made in respect of every conviction and order hereafter brought before the Court, or any Judge thereof, by writ of *Certiorari*; and after amendment in any such case, the conviction or order may be enforced in the proper manner, and shall in all respects, and for all purposes, be regarded and dealt with the same as if it had stood originally as amended.

XI. *Provision for dispensing with Notice*.—That in every such case as aforesaid, whether of *Habeas Corpus* or of *Certiorari*, the required notice may be given either after the issue of the writ or before; and that where copies of the conviction or order and depositions shall be produced at the time of applying for the writ, it shall be lawful for the Court or a Judge to dispense with such notice, if such Court or Judge shall think fit.

XII. *Summary Relief against erroneous convictions, &c.*.—That whenever, after the commencement of this Act, any person shall feel aggrieved by the summary conviction or order of any Justice or Justices, it shall be lawful for him, within twenty days after such conviction or order, (or where his place of residence shall be one hundred miles or upwards from Sydney, or, in Port Phillip, one hundred miles or upwards from Melbourne, then within thirty days after such conviction or order), to apply to the Supreme Court, or, in vacation, to one of the Judges thereof, for a rule or order calling on the Justice or Justices, and the party prosecuting, or otherwise interested in maintaining the conviction or order, to show cause to the Court why a prohibition should not issue to restrain them from proceeding, (or from further proceeding, as the case may be), upon or in respect of such conviction or order, which rule or order may be made returnable in term, or on any day in vacation on which the Court shall be holden, as in Banco, before two Judges; and if no cause be then shown, or on some day to which the case shall be adjourned, or the Court, after inquiring into the matter and consideration of the evidence adduced before the Justice or Justices, shall think that the conviction or order cannot be supported, the Court shall or may, in its discretion, direct that the writ applied for be issued, and may make such further order in the premises as shall be just, and the circumstances appear to require. (17 Vic., No. 39, ss. 3, 4, 5, 6, and 7).

XIII. *Proviso as to course of proceeding*.—That no such rule or order to show cause shall be granted or made except on an affidavit or affidavits, showing a *prima facie* case of mistake or error on the part of the Justice or Justices; and that where on cause being shown, the mistake or error (or mistakes or errors, if more than one) shall appear to be amendable, the Court shall allow the conviction or order to be forthwith amended accordingly; and from and after such amendment, the conviction or order may be enforced or dealt with in all respects as if the same had so stood originally: Provided also, that in all proceedings under this and the preceding section, the costs shall be in the discretion of the Court, and be payable by and to whom, and as and when, the said Court shall direct. (17 Vic., No. 39, ss. 10 and 16, p. 264, 265).

XIV. *Justices protected from actions in such cases*.—That in all cases

in which any such rule or order to show cause shall have been granted, no action shall be maintainable or commenced against the Justice or Justices before or by whom the conviction or order in question shall have been had or made in respect of any proceeding taken under, or matter arising out of, such conviction or order; and if any action shall be commenced in violation of this enactment, the same may summarily be stayed by order of the Court, or any Judge thereof, with costs to be paid by the plaintiff, to be taxed as between attorney and client.

XV. *Justices to give copies of depositions, &c., in summary cases*.—That in every case where a summary conviction or order before or by any Justices or Justice shall have been had or made, all parties interested therein shall be entitled to demand and have copies of the information and depositions, and of such conviction or order, in like manner and on the same terms as are provided respectively with regard to the depositions against a party committed or holden to bail. (11 & 12 Vic., c. 42, s. 27, p. 173).

XVI. *Prisoner's witnesses dying before trial, their depositions may be read in evidence*.—That in every case where any witness who shall have been called and examined before the Justice or Justices, by and on behalf of a party committed or held to bail, shall happen to die before the trial, the deposition of such witness may be read in evidence to the jury in his defence, if the party on trial shall so require. (17 Vic., No. 39, s. 13, and 11 & 12 Vic, c. 42, ss. 16 & 17, ante, p. 164).

(17 Vic., No. 39).

An Act to amend the Justices Act of 1850, in respect of Prohibitions and Amendments, and other matters. [12th November, 1853].

I. *Recital of Acts*.—The said recited Act (14 Vic., No. 43) may be cited as "The Justices Act of 1850," and this Act may be cited as "The Justices Act Amendment Act of 1853."

II. *To be taken as part of the Act 14 Vic., No. 43*.—This Act shall, so far as is consistent with the contents and subject matter thereof, be taken as part of and construed with the said recited Act. (14 Vic., No. 43).

III. *The Act to extend to all Convictions and Orders*.—The twelfth section of the said Act shall be deemed to extend to all Summary Convictions and Orders of what nature or kind soever made by any Justice or Justices.

IV. *Time for application for Writ of Prohibition extended*.—The time limited for making applications under the said recited Act shall be extended as follows:—where the place of residence of the party desirous of applying for any Writ of Prohibition shall be one hundred and fifty miles, or upwards, from Sydney, such application may be made within sixty days after the Conviction or Order.

V. *Power of a Judge extended*.—It shall be lawful for any Judge of the Supreme Court, if he shall think fit, as well in Term time as in Vacation, (in all cases where imprisonment shall have been directed, or

where the fine awarded, or the amount ordered to be paid, or the value of the matter adjudicated upon, shall not exceed Thirty pounds), to hear and determine applications for Writs of Prohibition directed to any Justice or Justices; and for that purpose to make such Rules and Orders, and issue such Writs, and allow such Amendments, as might have been made, or issued, or allowed, by the Court: Provided that any such Rule or Order, or Writ, may be discharged or varied, or set aside by the Court in Term, and such further Order thereupon be made as the case may require.

VI. *Power to Court or Judge to admit to bail*.—Where any person, committed to prison by virtue of any Summary Conviction or Order, shall be brought up by Writ of *Habeas Corpus*, and the Court or Judge shall postpone the final decision of the case, it shall be lawful for such Court or Judge to admit the person to bail, with or without sureties, for his appearance at such time and place, and upon such conditions, as the Court or Judge may appoint; and if the judgment be against such person, the Court or Judge may remand him to his former custody, there to serve the rest of the term for which he shall have been committed.

VII. *Judge on Circuit*.—Any Judge on the Circuit may exercise the powers given by this Act, or the said recited Act.

VIII. *Production of documents before Justices*.—In all cases where Justices have authority by Law to summon any person as a witness, they shall have the like authority to require and compel him to bring and produce, for the purposes of evidence, all documents and writings in his possession or power; and to proceed against every such person, in case of neglect or refusal, as in any case of neglect or refusal to attend, or refusal to be examined: Provided that no person shall be bound to produce any document or writing not specified or otherwise sufficiently described in the summons, or which he would not be bound to produce upon a subpoena *duces tecum* in the Supreme Court.

IX. *As to drawing up and transmitting Convictions*.—The time for applying for a Writ of Prohibition shall begin to run from the final adjudication as announced, whether orally or in writing, and the Conviction or Order need not be drawn up in form, in order to entitle the party so applying to the benefit of this or the said recited Act: Provided that the Court or Judge may postpone the decision, if justice shall appear so to require, until the Conviction or Order shall have been so drawn up, and in due form transmitted.

X. *Respecting the Amendment of Convictions, &c.*—In every case where the facts or evidence appearing by the depositions shall in substance support the adjudication of the Justice or Justices, (provided such adjudication shall not extend beyond the complaint or charge), and in every case where such facts or evidence would have justified or shall justify any necessary allegation or finding omitted in such adjudication, or in the formal Conviction or Order, or any Warrant issued in pursuance of such adjudication, the powers of Amendment conferred by this and the said recited Act respectively shall or may be exercised; and where a conviction shall be bad in respect of some excess which may (consistently with the merits of the case) be corrected, the Conviction shall be amended accordingly and shall stand good for the remainder; subject, nevertheless, to such

Order as to costs, and otherwise, as the Court or Judge shall, under the circumstances, think proper.

XI. *Stipendiary Police Magistrate may in all cases act alone in the absence of other Justices*].—And whereas doubts have arisen as to the special powers intended to be conferred by the said recited Act, and the Acts of Parliament thereby adopted, on Stipendiary or Police Magistrates: Be it declared and enacted That every Stipendiary or Police Magistrate in this Colony shall, in the absence of other Justices, have full power to do alone, at any time and place appointed for the holding of a Petty Sessions, whatever might be done by two or more Justices sitting in such Petty Sessions.

XII. *Justices for the Colony*].—The fifth section of the recited Act is hereby amended as follows: Every Justice, described as a Justice of the Peace for New South Wales, shall be taken to be a Justice for the Colony generally; but not for any Incorporated City or Town having a separate Commission of the Peace, unless words be used indicating that he is a Justice for such City or Town: Provided that in all cases every act done, or purporting to have been done, by or before any Justice of the Peace, shall be taken to have been within his jurisdiction, without an allegation to that effect, until the contrary be shown; and the words Justice of the Peace, or the letters J.P., after the signature to any magisterial act, shall be *prima facie* evidence that the party whose signature it purports to be is in fact a Justice of the Peace.

XIII. *Attendance of Witnesses for prisoner*].—The sixteenth section of the said recited Act shall be extended to cases in which the Witness shall be so ill as not to be able to travel, and to all cases in which the Justices who committed the Prisoner, or held him to bail, shall have certified, before such committal or holding to bail, that the evidence of the Witness is material, and that he is in their belief willing to attend the trial, but will be unable to bear the expense of attendance: Provided that this last enactment shall not extend to any Witness who has in due time before the trial been subpoenaed by the Crown. (See *ante*, p. 164).

XIV. *Prosecutor a competent Witness*].—The Prosecutor of any information shall be competent to give evidence notwithstanding that he may have a pecuniary interest in the result of the same.

XV. *Conduct of Summary Proceedings regulated*].—The practice before Justices, upon the hearing of matters in respect of which any Summary Conviction or Order may be made, or any Summary Adjudication is sought, shall, (as nearly as may be), in respect of the examination and cross-examination of witnesses, and the right of addressing such Justices upon the case, in reply or otherwise, be in accordance with that of the Supreme Court upon the trial of an issue of fact in an Action at Law.

XVI. *Want of Summons or Information.—Distribution of Penalty*].—Where the party convicted, or any party whose goods shall have been condemned or directed to be sold as forfeited, was present at the hearing of the case, the Conviction or Order shall be sustained, although there may have been no information or summons, unless he objected at such hearing that there was no information or summons; and no Conviction or Order shall be defeated for the want of any distribution, or for a wrong distribution, of the penalty or forfeiture.

SUMMARY.

(14 VIC., No. 43 ; AND 17 VIC., No. 39).

PROCEEDINGS ON PROHIBITION AND HABEAS CORPUS.

Effect of Colonial Act 14 Vic., No. 43, upon Summary Convictions.—In this Colony, much of the law upon summary convictions is considerably narrowed by the powers given to the Supreme Court, under 14 Vic., c. 43, in regard to summary convictions and orders, or warrants of commitment issued thereon.

The object of the Colonial Act in the sections now under consideration is twofold, being, first, remedial,—where a party ought not to have been convicted at all ; and, secondly, corrective,—where a party has been properly convicted, but committed to prison on an erroneous commitment. The sections which relate to this subject are from the 9th to the 15th, (both inclusive).

Construction of Section 9.—In sect. 9 there is an apparent difference between the powers contemplated in the reciting, and those conferred by the enacting part, the former using only the words “defects of form.” Any doubts as to the extent of amendment permitted by this section are removed by the provisions of the 10th section of the Justices’ Amendment Act, (17 Vic., No. 39,—see p. 264), which shows that the power of rectification by adaptation and alteration, besides that of mere formal amendment, is intended to be given.

How far efficacious.—It is not, however, every defect that will be cured even by these comprehensive sections, nor was it intended to operate as a transference to a higher Court of any power or discretion vested by law in the Justices. Thus, if a party be committed, under any Act, for an offence for which he might be imprisoned for a period not exceeding three months, and the warrant of commitment specify “six months,” the Court will not, it is presumed, alter the commitment to three ; for the sentence is, in such a case, not “warranted in substance,” but totally illegal through its excess ; and even if it were not so, the suggested alteration could not be made ; for the term of imprisonment is at the discretion of the Justices, and could not, therefore, be fixed by the Court. Several cases of this description have already occurred before the Supreme Court, in which the parties have been liberated on *Habeas Corpus*, notwithstanding it appeared from the depositions that they had been guilty of an offence which would have warranted their detention in prison for a period much beyond the time at which they had applied for, and were, in consequence of the excess, held entitled to, their discharge.

Should the defect be in the statement of the offence, it may or may not be curable, according to the facts contained in the depositions. If, for instance, a party is only liable to punishment for an offence by virtue of his holding a particular character or filling a particular office, and this be not stated in the warrant of commitment or conviction, and does not appear in, or cannot be gathered from, the depositions, it cannot be afterwards inserted, nor any evidence subsequently received of its being the fact. The omission in such a case will render the commitment void. The Court

If, however, the fact be stated in the conviction, the Court will not look to the depositions, but will amend the warrant of commitment by the former; for the depositions are only required by them where the conviction or warrant is defective; and they will not, *under this section*, look into the evidence for the purpose of rendering the commitment or conviction invalid, but for the purpose only of upholding them, if in want of such assistance to render them valid.

The language of s. 9 has not been found to be a very clear exposition of the manner in which it was intended to be practically worked. The defendant himself, or his Attorney, should give the required notice, and make the requisition to the Magistrates, either personally or by post.

Form of Certificate on transmission of Depositions, &c., by either the Justice or his Clerk.

**Between A. B., Complainant,
and
C. D., Defendant.**

Whereas, I, E. F., one of Her Majesty's Justices of the Peace, &c., by a notice bearing date, &c., have been required to transmit to Her Majesty's Supreme Court of New South Wales, (or, His Honor Mr. Justice one of the Judges of Her Majesty's Supreme Court of New South Wales), the conviction (or, order), information, and depositions taken in the above case before me, and on which the warrant of commitment issued by me, (or, by), committing the above-named defendant to gaol for a period of months, was founded, —or certified copies thereof. Now I, the said E. F., do hereby certify that

the accompanying information, depositions, and conviction (or order), are those which (or, that the accompanying documents are true copies of the information, &c., which, &c.) I have been so required to transmit, and which I hereby accordingly transmit, in pursuance of such requisitions. As witness my hand, this day of , at , in the Colony aforesaid.

E. F.

Where the Justice is absent, and the Clerk transmits and certifies the depositions, &c., the above Form may be easily altered to meet the case. The recital will be the same, excepting that the Justice will be spoken of in the third person, and the Clerk's name will not appear until the part commencing "Now I, &c.," which may be altered thus: "Now I, G. H., being the Clerk, &c.," and so on to the end.

The depositions, &c., when ready for transmission, shall be directed according to the terms of the requisition respecting them. If one of the Judges be named, they should be enclosed, under cover, to him; or, if the directions are generally to transmit them "to the Supreme Court, or a Judge thereof," as would be the case, if the notice were given *prior* to the application for a *Habeas*, they should be directed to "The Chief Clerk of the Supreme Court Office." They should always be transmitted at the earliest possible opportunity, and, where it can be done, by return of post; or, if any unforeseen impediment should arise, a communication might be made to that effect to the Crown Solicitor.

Transmission of Depositions, &c.—If the recommendation previously given be attended to, of recording all the proceedings in summary cases in a book, only copies *can* be transmitted; but whether they be so recorded or not, the more proper course would be to send copies, and preserve the originals in their regular place of deposit. There is nothing under s. 9 which makes it imperative on the Justices to comply with the transmission of depositions, &c., or to furnish depositions for any purpose, except on the terms mentioned in s. 15; but they would, probably, for their own justification, not hesitate to transmit them, if required to do so by the party applying for his discharge. It is true that the party could have obtained such copies for his own use, by an application under s. 15; but as their production might cure any defect in the warrant under which he was committed, and the Court would only look at them for that purpose, it is unlikely, in many cases, that the defendant or his Attorney would take any step not required by the Act to cause them to be produced. There are certain cases, however, partaking of the nature rather of a civil action than of an offence concerning the public, where the Justices, when required to transmit the proceedings, on receiving notice of the defendant's application for his discharge, might reasonably expect "the prosecutor or party interested" to support the commitment, and to be at the trouble and expense of procuring copies of the depositions, &c., and "causing them to be transmitted" to the Court or a Judge for that purpose. It is left optional to the party giving notice, whether it shall be to the Justice before whom the case was heard, "or to the prosecutor or party interested," and as such notice may, by s. 11, be given either before or after the issue of a *Habeas Corpus*, it is not always in the power of the Court or a Judge to suggest, in the first instance, if they should think fit to do so, to whom notice should be given. Where, however, they had an opportunity of

exercising a discretion in this respect, in all probability they would do so, if the particular case should seem to invite it.

Suggestion to Attorneys].—As a preliminary to what may be required of the Justices, some directions are suggested by Sir W. A'Beckett as to what should be done by a defendant or his Attorney, before applying for his discharge by *Habeas Corpus* on the ground of a defective commitment. In all cases, the proper course to pursue would be—first, to obtain copies of the depositions, information, and conviction, and to ascertain from their perusal, whether any defect discovered in the commitment, in respect of which an application for a *Habeas* is contemplated, is one which can be cured. If the Attorney sees clearly that, on inspection of the depositions, &c., by the Court, the defect will be curable, it is his duty to inform his client of that opinion, and its probable consequences; and he will do well to consider whether, after having formed such an opinion, he can conscientiously make the affidavit, or advise his client to do so, which is required by the Court or a Judge before directing a writ of *Habeas Corpus* to issue. It has been, however, too much the practice for Attorneys to make applications for a defendant's discharge from prison under a summary commitment, without taking the precaution above suggested, and the consequence, in many cases, has been a fruitless proceeding, and, of course, a fruitless expense.

Effect of Sec. 11].—Defendants may be so situated that the delay which must elapse before the Attorney could obtain the depositions, &c., would justify an application to the Court without them, if the commitment were clearly bad; and, of course, if it were incurably defective, no end could be attained by their production. Where, however, the depositions can be obtained without delay, the Attorney should always procure them; for if the defect in the commitment be not remedied by them, he can at once show that to the Court, and save the delay of a notice to the Justices; for, under s. 11, "where copies of the conviction or order and depositions shall be produced at the time of applying for the writ, it shall be lawful for the Court or a Judge to dispense with such notice, if such Court or Judge shall think fit." It is true that s. 9 prescribes both a notice of defendant's intention to apply for his discharge, and a requisition to transmit the depositions, &c.; but if these were already authenticated before the Court at the time of applying for the writ, they would hardly consider it obligatory on them to go through the form of having a requisition made to the Justices to transmit them.

Notice under Sec. 9].—Assuming, however, that the application has been made, or is intended to be made, for a *Habeas Corpus* before procuring the depositions, &c., the notice is recommended to be given, where practicable, both to the prosecutor and the Justices; for the Court or a Judge might possibly require, in the event of the latter only having had notice, and failed to transmit the depositions, that notice should be given also to the former. The notice might be in the following form:—

Form of Notice to either Justice or Prosecutor.

Between A. B., Complainant,
and
C. D., Defendant.

Take notice, that I, the above-named defendant, intend applying to Her Majesty's Supreme Court, or one of the Judges thereof, for a writ of *Habeas*

Corpus, in order that I may be brought up on such day as the said Court or a Judge may appoint, for the purpose of praying that I may be discharged from my imprisonment, under a warrant issued by you, (or, by E. F., one of Her Majesty's Justices of the Peace, &c.), in the above case against me, and under which I have been committed to gaol, for a period of months; and I further give you notice, and require you to transmit (or, cause to be transmitted) to the Supreme Court, or one of the Judges thereof, the information, depositions, and conviction taken and made before you, (or, before the said Justice), in the above case, or certified copies thereof, with as little delay as possible, in order that the same may be laid before the said Court or a Judge, on such day as shall be appointed for hearing the application for my discharge.

Dated this day of , at gaol.
To E. F., or G., Esq., (or, G. H., the prosecutor).

Service of Notice.—*Address on letter enclosing Notice*].—The notice may be given by the defendant's Attorney; but the Form will be, in other respects, the same as the above. If the notice be given *after* the *Habeas* has been made returnable, the day must of course be specified in the notice, and the name of the Judge or Court, as the case may be, stated. The parts between brackets mark the only variation necessary where notice is given to the prosecutor. If personal service can be readily effected, the Court would probably require that to be shown; but, having reference to the circumstances of the Colony, it has been in the habit of being satisfied with service by post. No rule, however, can be laid down on the subject, and, in any event, a duplicate of the notice should be preserved, in order that the contents of the service may be clearly shown, as well as the time of its transmission, and the probability of its receipt by the party to whom it is addressed. It is suggested that the superscription of the envelope enclosing the notice to the Justices should be addressed to the Magistrate by name, or, the Clerk of the Bench where the conviction has taken place. If two Magistrates have convicted, notice to one is sufficient. The alternative address to the Justice or Clerk is recommended, because it would enable the latter—and might become his duty, in the absence of the former—to certify and return the depositions, &c., under his own hand; for the Act, although it requires notice to be given to the Justices as to the transmission, does not require that it shall be made by them.

Court or Judge may admit to bail].—In addition to the above remarks, it is to be remembered that where any person, committed to prison by virtue of any summary conviction or order, shall be brought up by writ of *Habeas Corpus*, and the Court or Judge shall postpone the final decision of the case, such Court or Judge may admit such person to bail, with or without sureties, for his appearance at such time and place, and upon such conditions, as such Court or Judge may appoint. (S. 6 of 17 Vic., No. 9).

Any Judge on circuit may exercise the powers given by these Acts. (S. 7).

Proceedings against Erroneous Convictions].—The contents of ss. 12 & 13 (14 Vic., No. 43) will now be considered. Under these sections, a defendant may apply to the Supreme Court, or one of the Judges, for a prohibition to restrain the Justice or prosecuting party from proceeding in respect of any order or conviction, provided the application be made within a certain time, on an affidavit, "showing a *prima facie* case of mistake or error on the part of the Justices."

On the matter coming before the Court, they may test the conviction by the evidence, if it be attacked on the merits; and if it be assailed only on the ground of error or mistake, they may, if such error or mistake be amendable, direct the conviction or order to be amended accordingly; and, in all proceedings under these sections, a discretion is given them to award costs in such manner as they shall think fit.

"The object of this enactment," says Mr. Justice Wise, (*ex parte Lannoy*,—20th March, 1860), "is to allow an amendment whenever the truth and merits of the question, established by the actual proceedings before the Justices, show that the omission or mistake in the order would have been avoided if they had correctly understood the application of the law to the facts, provided the mistake did not affect the exercise of any discretionary power.

It will be seen, also, from a full perusal of the above sections, that formerly, although the rule might issue calling on the Justices to show cause why a writ of prohibition should not issue, it could only be made returnable before the full Court in Term, or in some day in Vacation on which the Court sits as in Banco before two Judges, and could, of course, only be made absolute at either of those times.

But, by s. 5 of the Amendment Act, (17 Vic., No. 39), jurisdiction has been given to any Judge of the Supreme Court, "if he shall think fit, as well in Term time as in Vacation, (in all cases where imprisonment shall have been directed, or where the fine awarded, or the amount ordered to be paid, or the value of the matter adjudicated upon, shall not exceed thirty pounds), to hear and determine applications for Writs of Prohibition directed to any Justice or Justices, and, for that purpose, to make such rules or orders, and issue such writs, and allow such amendments, as might have been made, issued, or allowed by the Court," subject, however, to be "discharged, varied, or set aside" by the full Court in Term.

Ss. 12 & 13 of 14 Vic., No. 43, and s. 10 of 17 Vic., No. 39, it will be observed by practitioners, involve proceedings of a different nature from those prescribed by s. 9. In the first place, the affidavit must state distinctly the express ground of the application, and ought to show clearly on the face of the proceedings the particular error complained of. For this purpose, verified copies of all the proceedings ought to accompany the affidavits, in order that the Court may see whether there are any *prima facie* grounds for the application; for, as the defendant himself may procure these under s. 15, the Court would not throw it upon the Justices to produce them in reply, but leave it to the defendant who complains of their insufficiency to establish that fact, if he can, by their production. By s. 10 of 17 Vic., No. 39, it is provided that, in every case where the facts or evidence appearing by the depositions shall *in substance* support the adjudication of the Justices, (provided such adjudication do not extend beyond the complaint or charge), and in every case where such facts or evidence would have justified or shall justify *any necessary allegation or finding* omitted in such adjudication, or in the formal conviction or order, or any warrant issued in pursuance of such adjudication, the powers of amendment conferred by this and the above-mentioned Act respectively shall and may be exercised; and where a conviction shall be bad in

respect of some excess which may (consistently with the merits of the case) be corrected, the conviction shall be amended accordingly, and shall stand good for the remainder, subject, however, to such order as to costs and otherwise as the Court and Judge shall, under the circumstances, think proper.

These sections are in some respects, certainly, in the nature of an appeal from the decision of the Justices; but hitherto the Court has never gone the length of reversing that decision, merely because their own conclusion might, upon the whole facts, have been different from that of the Justices. The principle upon which the Judges have hitherto acted is that pursued by them in applications for new trials on the ground of the verdict being against the weight of evidence; in which case, if there were any evidence at all to go to the jury, a new trial is generally refused. So, under these sections, it is conceived that it is their practice, in looking at the evidence taken before the Justices, to see simply whether it is sufficient in point of law to support the conviction. "We entertain no doubt, having regard to the enactments which have given the remedy by Prohibition, that it is our duty, before holding any conviction by a Magistrate to be erroneous, to look at and consider the *whole* of the evidence which was before him. In cases tried by a jury, the Court has ordinarily no jurisdiction to determine facts. If improper evidence be admitted on the trial, the course is to set aside the verdict; for it *may* have been founded, whatever the force of other testimony in the case, on the very matter which ought not to have been before the jury. In cases of this kind, however, the Court sits as a tribunal of appeal, with the double province assigned it,—of deciding on the facts as well as the law." (*Per* Sir A. Stephen, C. J., in *ex parte Ward*, in a written judgment delivered March, 1858).

With reference to costs, each case must depend on its own circumstances. In *Ex parte Smith*, before the Supreme Court of New South Wales, although the rule for a prohibition was discharged, the Court refused to give costs, remarking "that a person seeking his liberty ought not to be mulcted with costs except in extreme cases; and it could not be denied that the point involved in the case before them was one of much difficulty."

In consequence of the decision in the case of *ex parte Towns, in re Sharp*,—in which the Court held that the clauses relating to prohibition and amendment extended "only to orders and convictions in criminal cases, or concerning matters in their nature criminal,—not to adjudications or orders in cases of debt, or on claims or complaints in the nature of suits for debt,"—it was enacted by s. 3 of the Amendment Act, that the above-mentioned s. 12 shall be deemed to extend to all summary convictions and orders, of what kind or nature soever, made by any Justice or Justices.

JUVENILE OFFENDERS.

See "LARCENY."

S. 14 Vic., No. 2, s. 1. [*Two Justices*].—(1) Any person [whose age does not, in the opinion of the Justices before whom he shall be brought or appear, exceed the age of sixteen years, (16 Vic., No. 6, s. 1)] commit-

ting any offence now or hereafter by law deemed or declared to be, or punishable as, simple larceny. (s)

P. Impr., with or without h. l., not exc. 3 cal. m.; or, in discretion of Justices, forfeiture not exc. £3. If pecuniary penalty, and not paid forthwith, Justices may give time, and detain offender till the day appointed for payment, unless he gives security for his appearance on the day so appointed; in default of payment, impr. not exc. 3 cal. m., reckoned from the day of adjudication, unless sooner paid. (Id., s. 13). (τ)

S. Id., s. 1. [Two Justices].—(2) Any such person (as in offence 1) attempting to commit any such offence.

P. Same as offence (1). (v) (w)

N.B.—For petty larcenies by offenders not juvenile, see "Larceny."

(s) *Procedure*.—By summons, or warrant on charge on oath, (14 Vic., No. 2, s. 4); or the offender may be taken into custody without warrant.

If the case is to be treated as on a preliminary inquiry on an indictable offence, the following provisions of 14 Vic., No. 2, are repealed by the substituted provisions of 11 & 12 Vic., c. 42, viz.:—as to the process to be issued against offenders, (s. 4); the service of the summons, (s. 8); the remanding and bailing of the accused, (s. 5); as to the same Justices hearing the charge, (s. 13); the process to witnesses, (s. 7), and the Forms in the Schedule. If the case is to be treated as on a summary conviction, the 11 & 12 Vic., c. 43, would likewise operate as a repeal of the same sections of 14 Vic., No. 2; the only difference being, in any event, whether the accused must be asked if he object to the summary jurisdiction before or after taking the evidence for the prosecution. The latter course is most just and fair to the accused. The Forms of convictions (I. 2 or I. 3), certificate of dismissal (M.), and commitments (O. 1 or P. 1), in the case of a penalty or imprisonment imposed under 11 & 12 Vic., c. 43, may be used, the conviction and commitment being adapted as shown in Part II., *post*.

(τ) *Discretion of Justices*.—If such Justices, upon the hearing of any such case, shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, on finding surety or sureties for his future good behaviour, or without such sureties; and then make out and deliver to the party charged a certificate under the hands of such Justices, stating the fact of such dismissal; and such certificate shall and may be in the form or to the effect set forth in the Schedule to the Act annexed; (see Part II.): Provided also, that if such Justices shall be of opinion, before the person charged shall have made his or her defence, that the charge is, from any circumstance, a fit subject for prosecution by information or indictment, or if the person charged shall, upon being called upon to answer the charge, object to the case being summarily disposed of under the provisions of this Act, such Justices shall, instead of summarily adjudicating thereupon, deal with the case in all respects as if this Act had not been passed. (14 Vic., No. 2, s. 1). For procedure at hearing, see next page.

(v) *Aider and Abettor of Simple Larceny*.—The Legislature appears to have intended that aiders and abettors of such offences should also have been liable to summary conviction, but they have not succeeded in carrying their intention into effect. The first section enacts "That every person who shall be charged with having committed, or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any offence (declared to be simple larceny, &c.), and whose age at the period of the commission, or attempted commission, of such offence shall not exceed fourteen years, shall, upon conviction, &c.;" so that in the latter part there are no words applicable to the case of an aider, abettor, &c. Such persons, however, might be proceeded against under the provisions of 11 & 12 Vic., c. 43, s. 5. See, *ante*, "Aiders."

(w) *Apprehension*.—As this offence is a misdemeanor, it would seem that the offender could not be apprehended without a warrant after the misdemeanor is over. See *Gaunt v. Fox*, 3 B. & Ad., 798; *Matthews v. Biddulph*, 5 Scott, N. R., 54. See, *ante*, Note (s); and "Apprehension of Offenders," p. 11.

By s. 3 of 16 Vic., No. 6, One of the Justices before whom any person shall be charged and proceeded against under this Act, (or the Act 14 Vic., No. 2), *before* such person shall be asked whether he or she has any cause to show why he or she should not be convicted, shall say to the person so charged these words, or words to the like effect :—" We shall have to hear what you wish to say in answer to the charge against you ; but if you wish the charge to be tried by a jury, you must object now to our deciding upon it at once ;" and if such person, or the parent of such person, if under the age of sixteen, shall then object, the Justices shall proceed with the charge as if the said Acts had not been passed.

The course of procedure, accordingly, at the hearing, may be stated to be thus :—

1. The Clerk, after taking the depositions, to say to accused : "*The charge against you is for that you, on the day of , did*" (stating the offence as in the caption of the depositions).
2. Then one of the Justices to say, (pursuant to 16 Vic., No. 6) : "*We shall have to hear what you wish to say in answer to this charge, but if you wish the charge to be tried by a jury, you must object now to our deciding upon it at once.*"
3. If the accused, or his parent, do not object, then the Justices to say : "*Now we must ask you, are you guilty or not guilty ?*" If he plead "*guilty*," consider the punishment ; if he plead "*not guilty*," hear his defence, and consider the judgment.
4. If the accused, or his parent, do object, the summary jurisdiction cannot be applied, and the Justice must caution him in the usual form for an indictable offence, if the evidence be sufficient to send the accused to trial.

By s. 3 of 14 Vic., No. 2, "Every person who shall have obtained such certificate of dismissal as aforesaid, (*i. e.*, (see Note T) when the Justice shall deem the offence not to be proved, or that it is not expedient to inflict punishment), and every person who shall have been convicted under the authority of this Act, shall be released from all further or other proceedings for the same cause."

By s. 5, "Every such recognizance (*i. e.*, the recognizance of the bail for accused to appear on the remand day) may be enlarged from time to time by any such Justice or Justices, to such further time as he or they may appoint." See Forms of Enlargement of Recognizance, Part II.

By s. 7, "Any Justice may require and bind by recognizance all persons (Form of Recognizance, Part II.) whom he may consider necessary to be examined touching the matter of such charge, to attend at the time and place to be appointed by him, and then and there to give evidence upon the hearing of such charge ;" and, on neglect to appear, "such Justices before whom any person ought to have attended, may issue their warrant to compel his appearance as a witness."

By s. 11, "The conviction [which is not to be quashed for want of form, (s. 10)] and recognizances are to be forthwith transmitted to the Clerk of the Peace."

By s. 12, "No conviction under the authority of this Act shall be attended with any forfeiture ; but, whenever any person shall be *deemed*

guilty under the provisions of this Act, such presiding Justices may order restitution (x) of the property in respect of which such offence shall have been committed, to the owner thereof, or his representatives; and if such property shall not be forthcoming, the same Justices may, whether they award punishment or dismiss the complaint, inquire into and ascertain the value thereof in money, and, if they think proper, order payment of such sum of money to the true owner *by the person or persons convicted (sic)*, either at one time, or by instalments at such periods as the Court may think reasonable; and the party or parties so ordered to pay shall be liable to be sued for the same as a debt, in any Court in which debts may be by law recovered, with costs of suit, according to the practice of such Court."

By s. 2 of 16 Vic., No. 6, Summary jurisdiction is extended to larcenies (in which the money or property stolen shall not exceed in value *five shillings*; and, by 19 Vic., No. 24, s. 11, is extended to all cases where the same shall not exceed in value *forty shillings*) by persons of all ages; and such person is liable to imprisonment, with or without hard labour, for any period not exc. six mths., or shall forfeit any sum not exc. twenty shillings. See "Larceny."

Besides the offence of simple larceny, offences against ss. 38, 42, 44, 45, 5 of 7 & 8 G. IV., c. 29, come under the name of offences now or hereafter declared by law to be simple larceny, or punishable as simple larceny.

As neither of these Acts extends to receivers of stolen goods, when such persons are charged, either with or without a principal amenable to summary punishment under these Acts, the case should be heard as if intended for trial by jury.

LARCENY.

See "BURGLARY," "CATTLE," "DOGS," "EMBEZZLEMENT," "FALSE PRETENCES," "JUVENILE OFFENDERS."

Larceny is the wrongful taking or carrying away of the personal property of another, with a felonious intent to convert it to the taker's own use, and without the consent of the owner. This offence is characterized by one ingredient, viz., a wrongful removal (taking and carrying away) of the property of another, whether it be effected without the consent, or by consent obtained by intimidation or fraud, so that the owner consent not in the latter case to part with his entire right of property, but with the temporary possession only. (4 Cr. L. R., 50).

Larceny cannot be committed,—

1. Of things attached to or savouring of the reality; therefore, taking chattels real, documents relating to real property, &c., (see, as to documents relating to personalty, *R. v. Morrison*, 28 L. J. M. C., 211), is no larceny; nor can larceny at Common Law be of standing corn, nor of fruit from a tree which is growing, because, from its adherence to the freehold,

(x) The order for *restitution* may, it seems, be made on any person in whose custody the stolen property may happen to be; but no remedy is provided on the disobedience of such an order, and therefore it must be by indictment.

it is not larceny to steal the tree itself. (*R. v. Martin*, 1 Leach C. C., 171); but see 7 & 8 G. IV., c. 29, ss. 38, 39, 49.

2. Larceny cannot, at Common Law, be committed of a chose in action, as a bond, bill of exchange, &c.; the reason of which rule seems to be, that stealing the evidence of a man's right does not interfere with the right itself. (*R. v. Watts*, 1 Dears., 332). This point is elaborately considered in the recent case of *R. v. Morrison*, (28 L. J. M. C., 210), which decided that a pawnbroker's duplicate could be the subject of larceny, as being a warrant for the delivery of goods within s. 5 of 7 & 8 G. IV., c. 29, and was not a document concerning mere choses in action. "If it is a mere agreement to deliver property not the party's own, or not specific, it would be within the rule as to choses in action; it would rest in agreement,—would confer a right of action only; but a pawnbroker's ticket imports a property in possession; it is clear that the possession of the bailee or pawnee is the possession of the bailor or pawnor for the purpose of indictment."

3. Larceny cannot, at Common Law, be of animals *feræ naturæ*; nor even of some domestic animals unfit for human food, as a dog. (*R. v. Robinson*, 28 L. J. M. C., 58; *R. v. Spearing*, R. & R., 250).

In modification of the above-mentioned peculiar doctrines of the Common Law, various enactments have been passed with regard to the felonious removal of things annexed to the freehold;—with regard to instruments coming within the class of choses in action;—with regard to various animals, of which larceny could not, without the interposition of the Legislature, have been committed.

To constitute this offence, the chattel feloniously taken must have been the property, absolute or special, of its alleged owner; and cases do sometimes occur in which doubt may exist as to the party in whom the ownership of the chattel at the time of its assumed wrongful conversion really vested. In *R. v. Smith*, (2 Den. C. C., 449), the prisoner, professing to be about to pay prosecutor some money, produced a receipt stamp, which the latter filled up for the amount mentioned by the prisoner, who then, without paying the money due, went away with the receipt, intending to defraud the prosecutor. Held, that the prisoner could not be found guilty of stealing the receipt stamp from the prosecutor, because it had never been in his possession independently of the prisoner, nor was it ever intended that the receipt should be the property of the prosecutor.

In the next place, to constitute a "taking" in larceny, the chattel alleged to be taken must have been in the possession, actual or constructive, of him in whom the property is laid. *Reed's case* (1 Dears., 168, 257) shows very clearly what is meant by a constructive possession sufficient to make the offence larceny. There prisoner Reed had been sent by his master with a cart belonging to the latter, to fetch coals from a wharf of a company with whom he dealt for that article. On his way home with the coals, the prisoner, without authority for so doing, disposed of a quantity of them to a third person, and the question being whether the offence was larceny, it was held that it was.—"There can be no doubt," remarked Lord Campbell, C. J., "that, to support an indictment for larceny in such a case, the goods alleged to have been stolen must have been in the actual or constructive possession of the master; and if the master had not

otherwise the possession of them than by the bare receipt of his servant's upon the delivery of another for his master's use, although as against third persons this is in law a receipt of the goods by the master, yet, in respect of the servant himself, this will not support a charge of larceny, because, as to him, there was no tortious taking in the first instance, and therefore no trespass. Therefore, if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, not of larceny. But, if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at Common Law, or of embezzlement under the Statute." The reason being, that in the latter case there is a tortious and felonious "taking" within the meaning of that word, as used in the definition of larceny. The constructive possession of the coals by the prosecutor, in the case above cited, had commenced at the moment they were placed in his cart, so that there was a subsequent taking of the coals by the prisoner, whose intention was, beyond all question, felonious.

A watchmaker, induced by a fraudulent letter from the prisoner, sent a customer's watch, which he had had to regulate, by post, to a place named in the letter, addressed to the true owner; the prisoner, representing himself to be the true owner, went to the place and obtained the watch from the postmaster. It was held to be larceny, as the special property of the watchmaker, (if he had had any), had ceased when he had delivered the watch to the postmaster, and the postmaster had no special property in it, but was only a servant of the true owner, from whose possession, therefore, it was taken. (*R. v. Kay*, 26 L. J. M. C., 119).

Again, there will not be a *taking* sufficient to constitute larceny where the property alleged to have been stolen came into the hands of the prisoner *rightfully* in the first instance, and without an *animus furandi*, although it was afterwards wrongfully appropriated by him. If A. lends B. a horse for a particular journey, and B., having received the horse *bonâ fide*, afterwards rides away with it, he shall not be guilty of larceny; though, if the owner of the horse deliver him to a servant or agent, with orders that the latter shall take the horse to a distant place and there leave him, the possession would be deemed, constructively, to remain in the owner, and the agent would be guilty of theft in selling the horse while in charge of it, contrary to orders. (4th Cr. L. R., pp. 54, 55). And where the chattel was originally received by the accused, *animo furandi*, or where a constructive possession of goods confided to the prisoner's custody remained at the time of the conversion in their owner, the rule last stated does not apply. (*R. v. Hock*, 1 Mood. C. C., 87; *R. v. Harvey*, 9 C. & P., 353).

If, however, goods are sold on credit and delivered, no subsequent dealing with them by the vendee could amount to larceny. If A. deliver to B. a watch to be regulated or repaired, or a horse to be agisted, and B. sell it, this is not larceny, because these goods were delivered voluntarily, and not taken *animo furandi*. (*R. v. Thistle*, 1 Den. C. C., 502; *R. v. Smith*,

1 Mood. C. C., 473; *R. v. Pratt*, 1 Dears., 360); and see *R. v. Cohen*, 2 Den., 249, where the goods were parted with on the express understanding that they were to be paid for at the time, and were taken by the prisoner *animo furandi*.

In *Pratt's case*, (1 Dears., 360), the prisoner, having become involved in pecuniary difficulties, had assigned his goods by deed to trustees for the benefit of his creditors. The trustees did not take actual manual possession under the assignment, but the prisoner remained in possession as before, and, whilst thus in possession, he removed some of the goods, intending to deprive his creditors of them. The jury here expressly found, that the prisoner had not the care and custody of the goods as the agent of the trustees, and the Court of Criminal Appeal held, that, upon this finding, the prisoner, having been in lawful possession of the goods, could not be convicted of larceny.

Goods obtained in pursuance of a Contract.—In practice, a difficulty is sometimes experienced in determining whether goods alleged to have been stolen were not, in fact, obtained in pursuance of a contract between the prisoner and the prosecutor; here care is necessary in scrutinising the facts adduced in evidence, and in ascertaining whether the alleged contract was not a mere pretence or fraud upon the prosecutor,—part of a scheme for feloniously getting possession of his property, so as to render the *intention* which actuated the prisoner in doing so *felonious*. For instance, where the prisoner, a servant of the prosecutor, by a false statement, induced a fellow-servant who was charged with the custody of certain wheat belonging to the prosecutor, to allow him to remove some portion of it, which he subsequently appropriated to his own use. It was held to be larceny, because the artifice whereby the goods were in fact obtained, negatived the idea of bailment, and possession was obtained with intent, permanently, to convert the goods to the taker's own use. (*R. v. Robins*, 1 Dears., 418).

It is, indeed, laid down, that all felony includes trespass, and that, if the party accused of stealing be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. (Hawk., P. C., Bk. I., c. 19, s. 1). And it is further true that, to support an indictment of larceny, the prosecutor must have such possession as would entitle him to bring trespass. (Parke, B., in *R. v. Stear*, 1 Den. C. C., 355).

Hence, if goods are bailed, and bailee convert them *animo furandi*, this would not be larceny, because, being lawfully in possession of the chattel, the taking it would not constitute either a trespass or a felony.

According to this rule, if property be delivered to bailee, and he do any wrong *inconsistent with the contract*, as by breaking open the box containing the property, he thereby puts an end to the contract, and the property in the chattel reverts in its proprietor; the property being then revested, the carrier is guilty of larceny at Common Law, in taking any part of such property, as if he had, independently of any contract, taken it *animo furandi* from its owner's possession. (*Fenn v. Bittleston*, 7 Ex., 159). But now, by the recent Statute, (22 Vic., No. 9), it is enacted, that if any person being a bailor of goods or chattels, shall, with intent to defraud, convert such goods or chattels or any part thereof to his own use, or the use of any person other than the owner thereof, he shall be guilty of larceny.

The taking must be animo furandi].—Further, the taking must be *animo furandi*, and with intent to deprive the owner wholly of his property in the thing taken. “If,” says Alderson, B., “a servant take a horse out of his master’s stable, and turn it into the road, with intent to get a reward next day, by bringing it back to his master, such an offence is not larceny,” because the facts supposed would not evidence a felonious intent, *i.e.*, an intent to deprive the owner wholly of his property in the thing taken. (*R. v. York*, 1 Den. C. C., 35).

A person, however, may be guilty of this offence, who takes the property of another, and afterwards sells it to him again,—provided the thief took it with the intention that it never should revert to the owner as his own property except by sale. If, for instance, A. takes a horse from B., wrongfully disguises it, and then sells it back, this would be larceny. (*R. v. Hall*, 1 Den. C. C., 381).

A felonious intent could not be inferred from the taking of property in mere thoughtlessness, by way of joke; and where an assertion of property and ownership is meant by the taking, all semblance of a criminal intent manifestly disappears.

Appropriation of lost goods by the finder].—Where goods of a third person, having been lost, are appropriated by the finder to his own use, such appropriation, under certain circumstances, will—whereas, in others, it will not—amount to larceny. It will be larceny if the finder takes the goods with the intention of wholly applying them to his own use,—at the same time, “reasonably believing that the owner can be found,” (*R. v. Thurborn*, 1 Den. C. C., 387, 394), where the Court observes that it will be generally ascertained whether the accused *had reasonable belief that the owner could not be found*, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases, the existence of such a belief in the mind of the finder would be at once obvious; in others, it would appear only after an examination into the particular circumstances. Thus, if a horse is found feeding in an open common, or on the side of a public road,—or a watch is found *apparently hidden* in a haystack,—the taking of either description of property would be larceny, because the taker could have no right to presume that the owner did not know where to find it. On the other hand, if a man finds goods which have been actually lost, or which may reasonably be supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found,—this is not larceny; nor would it be if the taking occurred in such a place, and under such circumstances, as that the owner might be reasonably presumed by the taker to have abandoned his property in the particular chattel, or, at least, not to know where to find it; so that the crime of larceny cannot be committed unless the goods feloniously taken appear to have an owner; and further, unless the taker must have known or believed that the taking was *against the will* of the owner, which could not be if the property were believed to have been abandoned. Where a person finds a purse of money on the high-road, and appropriates it to his own use, the question for the jury is, whether he does it *at the time of finding* with a felonious intent; and that depends on whether, at the time,

he knows who the owner is, or has the means of knowing him by reason of the marks on the article indicating the owner. But the finder is not guilty of felony merely because, when *afterwards* learning who the owner is, he fails to make restitution, and fraudulently retains the property. (*R. v. Christopher*, 28 L. J. M. C., 35); and see *R. v. Preston*, (2 Den. C. C., 353), which shows that, if a man were to pick up in the street a bank-note marked with the owner's name, so that he could be easily discovered, with the innocent intention of finding out the owner, and restoring the note, and subsequently were to change his mind, and convert the note to his own use,—this would not amount to larceny.

In *R. v. West*, (1 Dears., 402), the prisoner was charged with stealing a purse and its contents under the following circumstances :—The prosecutor, after making a purchase at the prisoner's stall at market in a country town, accidentally left his purse upon it, and the prisoner thereupon appropriated it to her own use, and, on the prosecutor demanding it from her, denied all knowledge of it. The jury found that the prisoner took up the purse, knowing that it was not her own, and intending at the moment to appropriate it. They also found that the prisoner did not then know who was its rightful owner. The prisoner having been convicted, the Court held the conviction right, observing that, if there had been evidence that the purse and its contents were lost property, according to the strict meaning of that term, and the jury had so found, they ought further to have been asked whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found. There is a clear distinction, they said, between property *lost*, and property merely *mis-laid*, or put down and left by mistake, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return to it.

Where a hackney-coachman abstracts the contents of a parcel which has been accidentally left in his coach by a passenger, whose address he could easily find,—or where a tailor applies to his own use a pocket-book left in a coat sent to him for repair by a customer,—or where the purchaser of an article of furniture, as a desk, at a sale by auction, discovers valuables in it and appropriates them, provided in this case that the purchaser had express notice that he was not to have any title to the contents of the desk, if there happened to be anything in it,—or provided, without such express notice, that he had no ground to believe that he had bought the contents, and had reason to think, as he most likely would have, that the owner could be found, (*Merry v. Green*, 7 M. & W., 623),—are cases of larceny under circumstances analogous to those latterly considered.

Doctrine of relation.—But, although it is true that, where the taking of a chattel is in its inception lawful, a subsequent conversion of the thing taken, however tortious and wrongful it be in a moral point of view, is not larceny; yet, if the taking be in itself wrongful and unlawful, although without any felonious intent, a subsequent conversion of it with such intent will be larceny. Thus, in *R. v. Riley*, (1 Dears., 149), the prisoner was indicted for stealing a lamb, under the following circumstances :—It appeared that, having, in the first instance, put twenty-nine black-faced lambs, belonging to himself, into a field, containing ten white-faced lambs, belonging to the prosecutor, he afterwards took away his

own lambs and offered them for sale, as amounting in number to twenty-nine; the proposed purchaser, however, in counting the lambs, pointed out to the prisoner that there were thirty in the flock, which included one white-faced lamb, belonging to the prosecutor. The prisoner, nevertheless, sold them all to the other party on his own individual account; on the trial, the jury found that, at the time of leaving the field, the prisoner did not know that the prosecutor's lamb was in the flock, but that he had a felonious intention when he sold it. The Court of Criminal Appeal held, that he might be convicted of larceny,—for, assuming that the prisoner was ignorant of the fact of the lamb being in his flock when he drove it from the field, the so driving it away and keeping it was a tortious act, for which *trespass* would have lain, and this act became felonious when the prisoner, knowing that the lamb in question was not his own, sold it.

The Asportation].—Another ingredient, not yet noticed, in larceny, is the carrying away or “asportation” of the chattel; there must be not only a *taking*, but a *carrying away*. A bare removal from the place where he found the goods, though he does not quite make off with them, is sufficient asportation; as, if a man be leading another's horse out of a close, and be apprehended in the act; or, if a thief intending to steal plate takes it out of the chest in which it was, and lays it down on the floor, but is surprised before he can escape with it; (4 Bl. Com., 231); or, if gas be fraudulently severed and abstracted from the main, against the will and without the knowledge of the Company who supply it. (1 Dears., 203).

Larceny effected by means of an innocent Agent].—Lastly, in connection with taking and asportation as constituent ingredients in larceny, if a man, by means of an innocent agent, does an act which in law amounts to this crime, the employer, and not the innocent agent, is the person accountable for that act. And, further, should it appear that the asportation was not completed, the jury may, if the facts justify such finding, convict of the attempt to steal, for which, moreover, as a misdemeanor at Common Law, an indictment might clearly be preferred. (*R. v. Ferguson*, 1 Dears., 427).

Receiving Stolen Goods, &c.].—The offence of receiving goods, moneys, &c., knowing them to have been stolen, is sometimes scarcely distinguishable from that of stealing. (7 & 8 G. IV., c. 29, s. 54). As, for instance, where the thief and receiver are together when the felony is committed, and the thing taken is transferred by the former to the latter. It has been held, on the one hand, that the person who, whilst waiting outside a house, receives goods which a confederate is stealing in the house, is a *principal*; (*R. v. Owen*, 1 Mood. C. C., 96; and *per Alderson, B.*, 2 Den. C. C., 461); and, on the other hand, that if the goods be removed some little distance from the house before they are delivered into the prisoner's hands, he will be indictable as a *receiver* only. (*R. v. King, Russ. & R.*, 332).

With a view to remove the difficulty caused by this distinction, 13 Vic., No. 7, enacts, that in every indictment for feloniously receiving stolen goods, it shall be lawful to add a count for feloniously stealing the same, and *vice versa*.

To constitute the offence of receiving stolen goods, it must be shown in evidence that the goods were stolen, and that they were received by the

prisoner with knowledge that they had been stolen. If goods are stolen, and then returned by the owner to the thief, with directions to sell them to the prisoner, who had previously been suspected of receiving stolen goods, and the thief does so sell them, and hands over the proceeds to the former, the prisoner could not, under these circumstances, be convicted as a receiver; for, although such a case would seem to come within the spirit, it does not come within the words, of the Statute, (7 & 8 G. IV., c. 29), because the goods that had been stolen had subsequently passed into the possession and were under the control of the real owner, and, being so in his possession and control, were transferred by his authority to the prisoner. (*R. v. Dolan*, 1 Dears., 436, overruling *R. v. Lyons*, Car. & M., 217).

The receiving must be proved; *i. e.*, the possession, actual or constructive, must be shown to have passed to the prisoner; and therefore, where stolen fowls were forwarded in a hamper by a coach, without any address, but with instructions that it would be called for, and it was accordingly called for by the wife of one of the prisoners, who, however, on applying for it, was apprehended before it had been delivered to her, it was held that the wife could not be convicted of receiving stolen property, because she could not be said, by merely claiming the fowls, which never were actually or potentially in her possession, to have, in fact or law, received them. (*R. v. Hill*, 1 Den., 453).

In order to sustain an indictment for receiving stolen goods, it is not, indeed, necessary to show manual possession of them by the prisoner, provided they be within his control, or constructively in his possession. (*R. v. Smith*, 1 Dears., 494).

Although "receiving" implies "a taking into possession, actual or constructive," there may be much difficulty in distinguishing between the receipt of goods and the mere intention to receive them. "In all these cases, boundary lines," remarks Alderson B., (*R. v. Wiley*, 2 Den. C. C., 49), "are matters of great nicety, and seem to unthinking persons to involve absurd and frivolous distinctions; but those who are practically acquainted with the administration of the law have daily experience of their necessity, and know that, without them, acts and principles essentially different from each other in nature and operation, would be confounded together."

Married Woman].—In *R. v. Brooks*, the prisoner, a married woman, was indicted for receiving stolen goods; it appeared that the goods had been stolen by prisoner's husband from his employer, and were afterwards taken home and given to his wife by him. Held, that the prisoner could not properly be convicted of the offence; for there was not, under such circumstances, a receiving of the goods,—husband and wife being, for many purposes, regarded as one person in law. (1 Dears., 184).

Robbery is an open and violent larceny from the person, or the felonious and forcible taking from the person or in the presence of another, of goods or money against his will, by violence or by putting him in fear. In order to sustain an indictment for robbery, the prosecutor must prove either that he was actually in bodily fear from the defendant's actions at the time of the robbery, or he must prove circumstances accompanying the robbery, such as, in common experience, are likely to induce a man to part with his property for the safety of his person; and the law will presume fear

where there appears to be just grounds for it. (Fost., 128). A man may be convicted upon an indictment of stealing from the person, although the evidence adduced would have sufficed to sustain a charge of robbery. (*R. v. Pearce*, Rus. & R., 174). Also, on indictment for robbery, the prisoner may be convicted of an assault with intent to rob. (16 Vic., No. 18, s. 10).

Stealing in a Dwelling-house.—In regard to the meaning of the word dwelling-house, see *supra*, "Burglary." The offence of stealing in a dwelling-house may be in various degrees, according as the value of the chattel stolen is, or is not, below £5 in amount; (7 & 8 G. IV., c. 29, s. 12); in the former of which cases it is punishable merely as simple larceny, or as it is accompanied or not by any menace or threat, putting any person within such dwelling-house in bodily fear. (1 Vic., c. 86, s. 5). Either of these two latter offences is, however, justly regarded by our law as a crime of less enormity than that of breaking into a dwelling-house and stealing therein, and, *a fortiori*, than that of breaking into a dwelling-house by night with intent to commit felony.

In order to ensure a conviction for the offence of stealing in a dwelling-house to the value of £5, it is necessary to establish in evidence:—1. The larceny; 2. That the value of the thing taken reached the statutory limit; 3. That the larceny was committed within the dwelling-house of the prosecutor or some other person; (2 Mood. C. C., 285); and that the chattel stolen was, in technical phraseology, "under the protection of the dwelling-house." (*R. v. Carroll*, 1 Mood. C. C., 89).

S. 16 Vic., No. 6, s. 2, & 14 Vic., No. 2. [*Two Justices in Petty Sessions and in open Court*].—(1) Any person committing, or attempting to commit, or aiding, abetting, counselling, or procuring the commission of a simple larceny, or of any offence deemed or declared to be punishable as simple larceny, in which the money or property stolen shall not exceed in value the sum of forty shillings, (19 Vic., No. 24, s. 11), and consenting to have case determined by Justices.

P. Impr., with or without h. l., or h. l. on the roads, at the discretion of the Justices, for not exc. 6 cal. m.; or, in the discretion of the Justices, forfeit not exc. 20s. (y) (z)

(y) *Jurisdiction*.—The words of s. 2 of 16 Vic., No. 6, are—"the like jurisdiction as by 14 Vic., No. 2, is given, (see "Juvenile Offenders"), shall and may hereafter be exercised in, and all the provisions in the said Act contained shall, so far as the same are applicable, subject to the provisions" of s. 3, (see *infra*), "be extended and applied to all cases in which any person of any age exceeding 16 years shall be charged with any such offence as in the said Act is mentioned." These words are large enough to comprehend *aiders and abettors* of such larceny, &c., where the offenders are more than 16 years old, as this offence is certainly mentioned in s. 2 of 14 Vic., No. 2; although, as we have seen, it is not brought within the summary jurisdiction in the case of juvenile offenders. See Note (y), "Juvenile Offenders."

By s. 3, "One of the Justices before whom any person shall be charged and proceeded against under this Act, before such person shall be asked whether he or she has any cause to show why he or she should not be convicted, shall say to the person so charged these words, or words to the like effect:—"We shall have to hear what you wish to say in answer to the charge against you; but if you wish the charge to be tried by a jury, you must object now to our deciding upon it at

S. 7 & 8 G. IV., c. 29, s. 31. (A) [*One Justice*].—(2) *Beasts and Birds*.—Stealing (B) any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at Common Law. (C) (D) (E)

P. (1st offence), Forfeit, over and above the value of the beast or bird, not exc. £20, (F) (s. 31); in default of payment immediately or within period appointed, impr., with or without h. l., for not more than 2 cal. m. where the amount of the sum forfeited or of the penalty imposed, or of

once;" and if such person shall then object, the Justices shall proceed with the charge as if the said Acts had not been passed."

(Z) *Procedure*.—The procedure would seem to be by summons, or warrant on charge on oath. (14 Vic., No. 2, s. 4). If the penalty be pecuniary and not paid forthwith, Justices may give time, and detain offender till the day appointed for payment, unless he gives security for his appearance on the day so appointed; in default of payment, impr., not exc. 3 cal. m., reckoned from the day of adjudication, unless sooner paid. (14 Vic., No. 2, s. 13).

Apprehension.—See Notes to "Juvenile Offenders."

(A) The prosecution must be commenced within 3 cal. months after the commission of the offence, and the information should be on oath; but the case of *R. v. Millard* (22 L. J. M. C., 108) seems to have decided that, if the party appear before the Justice, it is not necessary that the information should have been upon oath, to warrant the Justice in proceeding to convict him.

(B) *Search Warrant, &c.*—By s. 63 a search warrant can be granted "as in the case of stolen goods," in which case the warrant authorizes the apprehension of the person in whose possession the goods are found; and any person to whom property is offered to be sold, pawned, or delivered, may, if he suspect any offence has been committed in respect of it, apprehend the person offering, and take him before a Justice. (S. 63). *Vide* Forms of Complaint and Search Warrant, Part II.

(C) *Discharge from First Conviction, and Pardon by Crown*.—Any person summarily convicted before a Justice of a first offence against these Acts, (7 & 8 G. IV., ss. 29, 30), may be discharged from his first conviction by the Justice, if he thinks fit, upon making satisfaction to the party aggrieved for damages and costs, or either of them, as ascertained by the Justice; (s. 68 of 7 & 8 G. IV., c. 29; s. 34 of 7 & 8 G. IV., c. 30); and, by s. 69 of 7 & 8 G. IV., c. 29, and s. 35 of 7 & 8 G. IV., c. 30, the Crown may pardon a person imprisoned under the Act, although for non-payment of money to another party. *Vide* Forms of Discharge, Part II.

(D) *Apprehension without Warrant*.—Offender found committing any of the offences under 7 & 8 G. IV., c. 29, (except under s. 34, *viz.*, angling in the day-time), may be immediately apprehended without warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or by any person authorized by him, and forthwith taken before some neighbouring Justice to be dealt with.

(E) *Appeal*.—Where sum adjudged to be paid exceeds £5, (see *Reg. v. Warwickshire Justices*, *ante*, p. 7),—or the imprisonment adjudged exceeds 1 cal. m.,—or the conviction takes place before one Justice,—appeal lies to the next General or Quarter Sessions holden not less than twelve days after the day of conviction; provided that appellant give to complainant a notice, in writing, thereof within three days after such conviction, and seven clear days at the least before such Sessions; and shall also either remain in custody until the Sessions, or enter into a recognizance, with two sufficient sureties, before a Justice, to appear at the Sessions, &c.

(F) *Application of Penalty.—Several Offenders*.—The sum forfeited for the value of any property stolen, or for the amount of any injury done, is to be paid to the party aggrieved, if known, except where such party shall have been examined in proof of the offence; and, in that case, or where the party aggrieved is unknown, to be applied in the same manner as a penalty which is to be paid to the overseer of the poor where offence committed for the county rate; (see "Assault," p. 24): Provided that where several offenders join in the commission of the same offence, and shall each be adjudged to forfeit a sum equivalent to the value of the property, or to the amount of the injury, no further sum shall be paid to the party aggrieved than that which is forfeited by one of such offenders only. (S. 66).

both, (as the case may be), together with the costs, does not exceed £5; for not more than 4 cal. m. where the amount, &c., not exc. £10; and for not more than 6 cal. m. in any other case;—determinable on payment; (s. 67); (g) (2nd offence), impr. with h. l. not exc. 12 cal. m.; and (if male, and convicted before two Justices), they may further order whipping once or twice, publicly or privately, after 4 days from conviction.

S. Id., s. 32. [One Justice].—(3) Person in whose possession, or on whose premises, any beast, or the skin thereof,—or any bird, or the plumage thereof,—found by virtue of search warrant, (Note B), such person, knowing that the beast or bird has been stolen, or that the skin is the skin of a stolen beast, or that the plumage is the plumage of a stolen bird.

P. The like penalty, mode of recovery, and punishment as foregoing, and to restore beast, &c., to owner.

S. Id., s. 33. [One Justice].—(4) *House Doves or Pigeons*.—Unlawfully and wilfully killing, wounding, or taking any house dove or pigeon, under such circumstances as shall not amount to larceny at Common Law.

P. Forfeit, over and above the value of the bird, not exc. £2, (s. 33), and impr., in default of payment, as in offence (2).

S. Id., s. 39. [One Justice].—(5) *Trees, Shrubs, &c., of value of 1s.*—Stealing, or cutting, breaking, rooting up, or otherwise destroying or damaging with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever respectively growing, the stealing of such article or the injury done being to the amount of one shilling at the least, (and not exceeding £1). (S. 38).

N.B.—*Stealing, &c., Trees, &c., in a park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house, if value, &c., exceed £1,—or, elsewhere, if exceeding £5,—is felony.* (S. 38). See s. 24 of 7 & 8 G. IV., c. 30, *post*, “Malicious Injuries.”

P. (1st offence), over and above the value of article stolen or injury done, not exc. £5; (s. 39); (H) in default of payment, impr. as in offence (2), *supra*; (2nd offence) (Note G), commitment with h. l. for not exc. 12 cal. m.; and (if male, and convicted before two Justices) they may order whipping once or twice, publicly or privately, in addition, after four days from conviction; (3rd offence), felony. (S. 39).

S. Id., s. 40. [One Justice].—(6) *Fences, Stiles, Gates*.—Stealing, or cutting, breaking, or throwing down with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail set up or used as a fence, or any stile or gate, or any part thereof respectively.

P. (1st offence), the same as offence (5); (subsequent offence) (Note G), the same as 2nd offence under offence (5).

S. Id., s. 41. [One Justice].—(7) *Possession of Property*.—Person in

(G) *Evidence of former Conviction*.—A copy, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to be unappealed against until the contrary be shown. (S. 72). Evidence of the identity of the offender is also necessary. And see p. 233, *ante*.

(H) *Fish, &c.*—It is considered that the provisions in ss. 34, 35, &c., relating to unlawful angling, are so little applicable to the circumstances of the Colony, that it is sufficient thus to refer to them. How the amount of damage is estimated, see *E. v. Whiteman*, (23 L. J. M. C., 120), cited *post*, “Malicious Injuries.”

whose possession, or on whose premises with his knowledge, the whole or any part of any tree, sapling, or shrub, or underwood, or any part of any live or dead fence, or any post, pale, rail, stile, or gate, or any part thereof, being of the value of 2s. at the least, is found by virtue of search warrant, and not satisfying the Justice that he came lawfully by the same.

P. Forfeit, over and above the value of article found, not exc. £2; (s. 41); and, in default of payment, impr. as in offence (2). How value ascertained, see *R. v. Whiteman*, cited *post*, "Malicious Injuries."

S. Id., s. 42. [One Justice].—(8) *Plants, Fruits, &c., in Gardens, &c.*] Stealing, or destroying or damaging with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory.

P. (1st offence), either impr., with or without h. l., for not exc. 6 cal. m., or else forfeit, over and above value or injury, not exc. £20; (s. 42); in default of payment, impr. as offence (2); (*subsequent offence*) (Note G), felony. (S. 42).

S. Id., s. 43. [One Justice].—(9) *Roots or Plants elsewhere*.—Stealing, or destroying or damaging with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or enclosed, not being a garden, orchard, or nursery ground.

P. (1st offence), either impr., with or without h. l., for not exc. 1 cal. m., or else forfeit, over and above value or injury, not exc. 20s.; in default of payment, with costs, impr., with or without h. l., for not exc. 1 cal. m., unless sooner paid; (*subsequent offence*), impr. with h. l. for not exc. 6 cal. m.; and (*if male*, and convicted before two Justices), they may further order whipping, as offence (5). (S. 43).

S. Id., s. 60. [One Justice].—(10) Any person receiving any property, the stealing or taking which is punishable on summary conviction under the Act, knowing the same to have been unlawfully come by.

P. Liable to the same forfeiture and punishment as a principal offender. (S. 60).

S. Id., s. 62. [One Justice].—(11) Any person aiding, abetting, counselling, or procuring the commission of any offence punishable on summary conviction under the Act.

P. Same as principal offender.

S. Id., s. 19. [One Justice].—(12) Any person in whose possession is found, or on whose premises with his knowledge, any goods, merchandize, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, (by virtue of a search warrant), not satisfying the Justice that he came lawfully by the same.

P. Forfeiture, over and above the value of the goods, &c., not exc. £20: to be recovered as offence (2).

S. Id., s. 20. [One Justice].—(13) Any person offering or exposing for sale any goods, merchandize, or articles whatsoever, which shall have been unlawfully taken, or reasonably suspected so to have been, from any ship or vessel in distress, or wrecked, stranded, or cast on shore, not satisfying the Justice that he came lawfully by the same.

P. Fine not exc. £20 over and above the value of the goods: to be recovered as offence (2).

S. 9 Vic., No. 14, s. 1. [One Justice].—(14) Any person stealing any dead wood lying on land in the occupation of another,—the wood so stolen being of the value of one shilling at the least.

P. (1st offence), fine not exc. £5 over and above the value of the wood ; (2nd offence, recoverable before two Justices), fine not exc. £10 ; (3rd and and subsequent offence), larceny. If pecuniary penalty, to be recovered either by distress, (11 & 12 Vic., c. 43, s. 19), or according to 5 W. IV., No. 22. See "Justices, No. 2," p. 191.

N.B.—In the information, it is sufficient to allege that the person charged has stolen wood, without stating whether the wood so stolen was alive or dead ; (s. 2) ; and such offender can be convicted either under this Act, or 39 s. of 7 & 8 G. IV., c. 29.

F. at Com. Law. Bail disc.—(1) Simple Larceny (1), *i. e.*, the taking and carrying away of the personal goods of another, of any value, against the will, or without the consent, of the owner, without any *bonâ fide* claim of right, with a felonious intent. (κ)

P. Tr. 7 yrs. ; or, impr. not exc. 2 yrs., h. l., s. c., and w. ; or (if male) h. l. on roads 5—3 yrs. ; (if female), impr. 3—1 yr., h. or l. l. and s. c.

F. 7 & 8 G. IV., c. 29, s. 5. Bail disc.—(2) Of orders, debentures, bills, bonds, &c., warrants, or other securities for money or goods.

P. The same.

M. Id., s. 23. Bail comp.—(3) Deeds, &c., being evidence of title to real property.

P. Tr. 7 yrs. ; or fine or impr., or both, h. l., and s. c., as Court shall award ; or (if male) h. l. on roads 5—3 yrs. ; (if female), impr. 3—1 yr., h. or l. l. and s. c.

M. Id., s. 22. Bail comp.—(4) Wills or codicils, &c., or fraudulently destroying or concealing same.

P. The same.

M. Id., s. 21. Bail comp.—(5) Records, or other original documents from Court of Record, or obliterating, injuring, or destroying the same.

P. The same.

M. 8 & 9 Vic., c. 47, s. 2, (adopted by 14 Vic., No. 16). Bail comp.—(6) Larceny of Dogs, (2nd offence). See title "Dogs," p. 86.

P. Fine or impr., with h. l., not exc. 18 cal. m., or both.

M. Id., s. 3. Bail comp.—(7) Having possession of stolen dogs, or skin, (2nd offence).

P. Fine or impr., or both.

M. Id., s. 6. Bail comp.—(8) Corruptly taking reward as to a stolen dog.

P. The same.

F. 7 & 8 G. IV., c. 29, s. 38. Bail disc.—(9) Stealing, or damaging with intent to steal, a tree, sapling, shrub, or underwood, growing in a

(1) *Enactment*.—By 16 Vic., No. 18, ss. 16, 17, Three larcenies from the same person within six months, may be included in the same indictment.

(κ) *R. v. Gorbett* (26 L. J. M. C., 47), decides that a person indicted for stealing cannot be convicted of stealing on evidence showing him to be guilty of embezzlement, though he might on such evidence, on the same indictment, have been convicted of embezzlement.

park, pleasure-ground, garden, orchard, avenue, or in any ground belonging or adjoining to a dwelling-house,—value or damage above £1.

P. Tr. 7 yrs.; or, impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 5—3 yrs.; (*if female*), 3—1 yr., h. or l. l. and s. c.

F. *Id.* Bail disc.—(10) The like, growing elsewhere, value exceeding £5. See *R. v. Whiteman*, (23 L. J. M. C., 120), *as to how damage estimated*, “Malicious Injuries,” *post*.

P. The same.

F. *Id.*, s. 39. Bail disc.—(11) The like, wheresoever growing, of value of 1s. at the least, after two previous summary convictions. See *S. offence* (5), p. 285.

P. The same.

F. *Id.*, s. 42. Bail disc.—(12) The like, a plant, root, fruit, or vegetable production, growing in a garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, after one previous summary conviction. See *S. offence* (8), p. 286.

P. The same

F. *Id.*, s. 44. Bail disc.—(13) The like, metal, wood, &c., fixed to houses, land, or in any public place.

P. The same.

F. *Id.*, s. 37. Bail disc.—(14) Stealing, or severing with intent to steal, ore or coal from mines.

P. The same.

F. 1 Vic., c. 87, s. 5. Bail disc.—(15) Stealing or robbery from the person of another.

P. Tr. 15—10 yrs.; or (*if male*) h. l. on roads 10—5 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.

F. *Id.*, s. 2. Bail disc.—(16) Robbery and stabbing, cutting, or wounding person. (L)

P. Death.

F. *Id.*, s. 3. Bail disc.—(17) Robbery, or assaulting with intent to rob, and being armed.

P. Tr. life—15 yrs.; or (*if male*) h. l. on roads 15—7 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.

F. *Id.* Bail disc.—(18) Robbery, or assaulting with intent to rob, and in company with one or more other person or persons.

P. The same.

F. *Id.* Bail disc.—(19) Robbery, or assaulting with intent to rob, and beating, striking, or using violence.

P. The same.

F. *Id.*, s. 7. Bail disc.—(20) Demanding property with menaces or by force, with intent to steal the same.

P. Impr. not exc. 3 yrs.; h. l. and s. c.

F. 7 & 8 G. IV., c. 29, s. 12. Bail disc.—(21) Stealing in a dwelling-

(L) *Verdict*].—By s. 11 of 16 Vic., No. 18, If the Jury do not find the prisoner guilty of robbery, but that he did commit an assault with intent to rob, they may find him guilty of the latter; or, if the stabbing, &c., be not proved, he may be found guilty of stealing from the person, (*R. v. Wallis*, 2 Car. & K., 214), or of simple larceny.

house, or a building communicating therewith, to the value of £5 or more.

P. Tr. 15—10 yrs.; or (*if male*) h. l. on roads 10—5 yrs.; or impr. not exc. 3 yrs., h. l. and s. c. (7 W. IV. & 1 Vic., c. 90, s. 1).

F. 1 Vic., c. 86, s. 5. *Bail disc.*—(22) Stealing in a dwelling-house, and putting any one therein into bodily fear.

P. Tr. 15—10 yrs.; or (*if male*) h. l. on roads 10—5 yrs.; or impr. not exc. 3 yrs., h. l. and s. c. (1 Vic., c. 90, s. 3). See "Housebreaking," p. 144).

F. 7 & 8 G. IV., c. 29, s. 16. *Bail disc.*—(23) From manufactories, to value of 10s.

P. The same.

F. *Id.*, s. 17 and 1 Vic., c. 87, s. 8. *Bail disc.*—(24) From ships in quay, or wrecked, or stranded; or from docks, wharfs, &c.

P. The same.

F. *Id.*, c. 27, s. 46. *Bail disc.*—(25) By clerks or servants, or three larcenies within six months. (M)

P. Tr. 14—7 yrs.; or impr. not exc. 3 yrs., h. l., s. c., and w.; or h. l. on roads 10—5 yrs., (*if male*).

F. *Id.*, s. 45. *Bail disc.*—(26) By tenants or lodgers, of chattels or fixtures, let to be used with house or lodging.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 5—3 yrs.

F. *Id.*, c. 28, s. 11. *Bail disc.*—(27) Larceny after a previous conviction for felony.

P. Tr. life—7 yrs.; or impr. not exc. 4 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 15—5 yrs.; (*if female*), impr. 7—2 yrs., h. l. and s. c. (See "Subsequent Felony").

F. *Id.*, c. 29, s. 61; 1 Vic., c. 86, s. 6; c. 87, s. 9. *Bail disc.*—(28) *Accessories* after the fact.

P. Impr., with h. l. and s. c., for not exc. 2 yrs.

LETTER (THREATENING).

F. 4 G. IV., c. 54, s. 3; and 10 & 11 Vic., c. 66, s. 1; (*adopted by* 14 Vic., No. 16). *Bail disc.*—(1) To kill any person, or burn or destroy house, &c.

P. Tr. life—7 yrs.; or impr., with or without h. l., not exc. 4 yrs., and w.; or (*if male*) h. l. on roads 15—5 yrs.; (*if female*), impr. 7—2 yrs.; h. or l. l. and s. c.

F. 7 & 8 G. IV., c. 29, s. 8. *Bail disc.*—(2) Demanding money, &c., by letter, without reasonable or probable cause.

P. The same.

F. *Id.*, and 10 & 11 Vic., c. 66, s. 1, (*adopted by* 14 Vic., No. 16). *Bail disc.*—(3) Accusing, or threatening to accuse, of a crime, with a view to extort money, by letter.

(M) Upon an indictment for this offence, the jury may find the prisoner not guilty of it, but guilty of embezzlement, and he shall then be punished accordingly. (16 Vic., No. 18, s. 18). See Note (1), p. 287.

P. The same.

[See "Accusing," ante, p. 3, where threats not by letter; and title "Sodomy," post, where money extorted].

LIBEL.

A Libel is a malicious defamation, expressed in print, writing, or by signs, tending to injure the reputation of another, and exposing him to public hatred, contempt, or ridicule.

A libeller may, in many cases, be proceeded against either by indictment or by action, the object of the indictment being, to punish the offence committed against the public, for every libel has a tendency to cause a breach of the peace on the part of the person libelled.

The offence of libel against an individual consists in the act of publishing the defamatory matter set forth on the record in the sense attributed to it by the innuendos, with intent to injure, vilify, and prejudice the prosecutor, and to deprive him of his good name, &c., to bring him into public contempt, maliciously, without any legal justification or excuse.

By 11 Vic., No. 13, s. 5, No indictment or information shall be maintainable against any newspaper or other publication for a faithful report of any judicial proceedings, the same not being of a preliminary nature: Provided that no newspaper, &c., may publish any matter of an obscene and blasphemous nature, nor any judicial proceedings which may not be concluded, and which the presiding Judge may pronounce it to be improper to publish at their then stage.

The venue, generally speaking, must be laid in the county where the publication takes place. In the case of a libellous letter, it may be laid either in the place where the letter was posted, or where it was delivered. (*R. v. Watson*, 1 Camp., 215).

Cases for aggravated defamation may well require sureties for good behaviour. See "Sureties." (*Haylocke v. Sparke*, 22 L. J. M. C., 72).

A Justice of the Peace has authority to issue his warrant for the arrest of a party charged with having published a libel; and, upon neglect of the party so arrested to find sureties, may commit him to prison, there to remain till he be delivered by due course of law. (*Bull v. Conant*, 1 B. & B., 548).

M. 11 Vic., No. 13, s. 7.(N) Bail comp.—(1) Any person publishing

(N) On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and, to entitle the defendant to give evidence of the truth of such matters charged, as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation; and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be entitled to reply generally, denying the whole thereof. (S. 10).

or threatening to publish any libel upon any other person,—or directly or indirectly threatening to print or publish,—or directly or indirectly proposing to abstain from printing or publishing,—or directly or indirectly offering to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money or security for money or any valuable thing, or any valuable thing, from such or any other person; or with intent to induce any person to confer on or procure for any person any appointment or office of profit or trust.

P. Impr. for not exc. 3 yrs., with or without h. l.

M. Id., s. 8. Bail comp.—(2) Any person maliciously publishing any defamatory libel, knowing the same to be false.

P. Impr. not exc. 2 yrs., and fine as Court may award.

M. Id., s. 9. Bail comp.—(3) Any person maliciously publishing any defamatory libel.

P. Fine or impr. not exc. 1 yr., or both.

M. at Com. Law. Bail comp.—(4) Against the person and Government of the Queen.

P. Fine or impr., or both. (Arch. Cr. Pl., 607).

M. at Com Law. Bail comp.—(5) Against either House of Parliament,—against the Constitution,—or the administration of justice.

P. Fine or impr., or both. (Arch. Cr. Pl., 670).

LOCK UP.

See "FELONS (ABSCONDING)," "GAOL," "HARD LABOUR," "PRISONER."

By 16 Vic., No. 26, s. 1., In all cases in which Justices shall, in the exercise of summary jurisdiction conferred on them by law, award imprisonment for periods not exceeding fourteen days, it shall be competent to such Justices, if they shall think fit, to direct such imprisonment to be in the nearest lock-up or watch-house, in lieu of in any gaol or house of correction.

By 20 Vic., No. 28, (Masters and Servants' Act of 1857), s. 15, Wherever the nearest gaol may be distant more than thirty miles, the nearest lock-up or watch-house may be used as a gaol: Provided that nothing herein shall authorize the imprisonment of any person in such lock-up or watch-house for a longer period than fourteen days.

LODGERS.

See "LARCENY."

LOTTERIES.

S. 16 Vic., No. 2, s. 1. [*Two Justices*].—Every person selling or disposing of, or agreeing or promising, whether with or without consideration, to sell or dispose of, any goods, wares, or merchandize whatsoever, to or among any person or persons whomsoever, by means of any game either of skill or of chance, or of any other contrivance or device whatsoever, whereby any such goods, wares, or merchandize shall be sold or disposed of, or agreed or promised to be sold or disposed of, or divided or allotted to or among any person or persons, by lottery or chance, whether by the

throwing or casting of any dice, or the drawing of any tickets, cards, lots, numbers, figures, or by means of any wheel or otherwise how-ever. (o)

P. Forfeit, not exc. £100 : to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22. See "Justices," No. 2, p. 243.

LUNATICS.

By 7 Vic., No. 14, If any person be discovered and apprehended in the Colony of New South Wales under circumstances denoting a derangement of mind, and a purpose of committing suicide, or some crime for which, if committed, such person would be liable to be indicted, it shall be lawful for any two Justices of the Peace of New South Wales, before whom such person may be brought, to call to their assistance any two legally qualified medical practitioners; and if, upon view and examination of the said person so apprehended, and upon proof on oath by the said two medical practitioners to the effect that, in their opinion, such person is a dangerous lunatic or a dangerous idiot, and on any other proof, the said Justices shall be satisfied that such person is a dangerous lunatic or a dangerous idiot, then it shall be lawful for the said Justices, by warrant under their hands and seals, to commit such person to some gaol, house of correction, or public hospital within the said Colony, there to be kept in strict custody, until such person shall be discharged by the order of two Justices of the Peace, one whereof shall be one of the Justices who has signed such warrant, or by one of the Judges of the Supreme Court of New South Wales, or, until such person shall be removed to some public Colonial Lunatic Asylum, by order of His Excellency the Governor of New South Wales for the time being, as provided in the Act. *Vide* the Act in Call., vol. ii., p. 851.

The practice commonly followed is for the Magistrates to order the alleged lunatic to find sureties to keep the peace or to be of good behaviour, and, in default, to be imprisoned. Being unable to find such sureties, the defendant is committed; and then the Governor of the gaol or the Visiting Justice becomes the person "under whose actual care the lunatic is." The ulterior proceedings are contained in the following instructions, which were recently issued from the Colonial Secretary's office, and are dated 2nd October, 1856 :—

ADMISSION OF INSANE PERSONS INTO THE LUNATIC ASYLUM.

1. The attention of persons applying for the admission into the Lunatic Asylum of persons of unsound mind, under the 11th section of the Act 7 Victoria, No. 14, is requested to the provision contained in the Act 13 Victoria, No. 3, that in cases where the insane person has no relative or guardian in the Colony, or none accessible without inconvenient delay, *any person or society under whose protection and care such insane person shall*

(o) By s. 3. This Act does not affect the Art Union Act. (14 Vic., No. 13), nor does it apply to the sale by raffle, &c., of articles exposed at Fancy Fairs for raising funds in aid of any charitable institution of a public character.

actually be, shall be deemed the guardian for the purposes of the first-mentioned enactment.

2. Every application of the above description must be from one of the relatives or guardians of the lunatic, in the form annexed (A), which must be sanctioned by one of the Judges of the Supreme Court. For this purpose the application must be taken (or sent) to the Prothonotary of the Court, or one of the Judges' Clerks.

3. A Certificate must be attached to the petition, in the form hereto annexed (B), signed by two legally qualified Medical Practitioners, stating that they have examined the person, and found him or her to be of unsound mind, and that they consider such person will be benefitted by treatment in the Lunatic Asylum.

4. In all applications of this nature, the relationship in which the applicant stands to the lunatic must be stated; but, in cases where the lunatic has no accessible relative or guardian, the application may proceed from the principal officer of any public charity, or the Gaoler, or *other person* (master or friend), under whose *actual protection and care* the lunatic is:—stating the fact, as the case may be.

5. The application, when sanctioned by one of the Judges, is to be forwarded to the Colonial Secretary.

6. The charge for the maintenance in the Lunatic Asylum of a lunatic, male or female, is *two shillings and two-pence* per diem; and, except in the case of a pauper, the person seeking the lunatic's admission will be required to furnish to the Visiting Justice of the Lunatic Asylum an engagement from two responsible persons for the regular payment of this sum.

7. If the application be for the admission of the lunatic as a pauper, a certificate will be required from some respectable person known to the Government, to the effect not only that such lunatic is without funds, but is also without friends who can reasonably be expected to maintain such lunatic.

CHARLES COWPER.

(A.)

(*Form of Petition to His Excellency the Governor*),

To His Excellency Sir William Thomas Denison, Knight, Captain-General and Governor-in-Chief in and over Her Majesty's Territory of New South Wales, &c., &c., &c.

The Petition of (G. H.) of (*state residence, and trade or calling.*)

Respectfully sheweth, that (A. B.) of (*state residence, and trade or calling*), has been examined and found to be of unsound mind, as will appear by the annexed Certificate; and that your Petitioner, who is the *father* (or *other relative, or guardian*) of the said (A. B.), is desirous of procuring (*his or her*) admission into the Lunatic Asylum, in order that (*he or she*) may there have such Medical care and attendance as may be most likely to ensure (*his or her*) eventual recovery. *If the Petitioner be not a relative or guardian, say, instead of the words "who is the father," &c., as follows:—"who has the actual protection and care of the said A. B., and is therefore (his or her) guardian, under the 13 Vict., No. 3, s. 2, is desirous," &c.*

(*Add any circumstance requiring explanation, and whether the insane person is proposed to be maintained by the Petitioner or by the public.*)

Your Petitioner therefore prays that your Excellency will be pleased to direct that the said (A. B.) may be received into such Lunatic Asylum as your Excellency may think fit to appoint.

NOTE—If the insane person is sought to be admitted at the public cost, the following Certificate should be added :—

I, (J. K.), of (state residence, &c.), do hereby certify, that to the best of my knowledge and belief, (A.B.) who is described in the foregoing petition, has not the means of paying for (his or her) maintenance in the Lunatic Asylum, and that (he or she) has not any relative or friend who can be reasonably expected to maintain (him or her.)

(Signed.) (J. K.)

If the application proceeds from a near relative, such as a husband, father, &c., the Certificate should be as follows :—

I, (J. K.), of (state residence, &c.), do hereby certify, that to the best of my knowledge and belief, neither (G. H.) nor (A. B.) who are described in the foregoing petition, has the means of paying for the maintenance of (A. B.) in the Lunatic Asylum, and that (A. B.) has not any relative or friend who can be reasonably expected to maintain (him or her.)

(Signed.) J. K.

(B.)

(Form of Medical Certificate.)

We, the undersigned, being legally qualified Medical Practitioners, do hereby certify, that we have examined (A.B.) of (state residence, trade or calling, &c.), and that we find (him or her) to be of unsound mind, and a proper object for reception into the Lunatic Asylum; and we further certify, that in our opinion the said (A. B.) would be benefitted by treatment in such Asylum.

(Signed.) { C. D.
E. F.

MAINTENANCE.

M. at Com. Law. Bail comp.—Of suits or quarrels of others.

P. Fine or impr., or both; or, by 33 Edw. I., s. 3, impr. for 3 yrs., and fine at the King's pleasure. (1 Hawk., c. 83, ss. 1, 2).

MALICIOUS INJURIES.

S. 7 & 8 G. IV., c. 30, s. 20. (P) (Q) [*One Justice*].—(1) *Trees, Shrubs, &c., to amount of 1s.*—Unlawfully and maliciously cutting, breaking,

(P) *Apprehension without Warrant; Information on oath; Amount of Damage*.—Offenders found committing any of the offences under this title, may be apprehended immediately without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring Magistrate to be dealt with according to law. (S. 28). The information should be on oath; (s. 30); but see "*Larceny*," p. 284. (*R. v. Millard*, 22 L. J. M. C., 108). If the amount of injury be less than 1s., it seems doubtful whether the offender can be convicted under s. 24, (*offence 5*). In *R. v. Dodson*, (9 A. & E., 704), it appeared to be considered that the sections applied to such a case; but, in the later case of *Charter v. Graeme*, (13 Q. B., 216), this was doubted. In all cases of a first conviction, the Justices may discharge the offender upon his making such satisfaction to the party aggrieved as shall be ascertained by the Justices. (*Id.*, s. 34).

(Q) *How value or amount of damage ascertained*.—The amount of the damage actually done is the criterion, and it cannot include consequential damage; and therefore, upon an indictment for damaging trees growing in a hedge exceeding £5, it has been held that it is not sufficient to show that the actual injury to the trees was £1, and that the repairs rendered necessary by the damage amounted to £4 odd more. (*R. v. Whiteman*, 23 L. J. M. C., 120).

barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever growing, the injury being to the amount of 1s., (and not exceeding £1, see s. 19). (x)

MEM.—*Malice against the owner of property in respect of which any offence is committed under this Act, need not be proved.* (S. 25).

P. (1st offence), Forfeit, over and above injury, not exc. £5, (s. 20); in default of payment immediately, or within such period as the Justice shall appoint, impr., with or without h. l., for not more than 2 cal. m. where amount to be paid, together with costs, not exc. £5; and for not more than 4 cal. m. where amount with costs not exc. £10; and for not more than 6 cal. m. in any other case;—impr. to determine on payment; (s. 33); (s) (τ) (2nd offence), impr. with h. l. for not more than 12 cal. m.; and (if a male and convicted before two Justices), they may further order whipping once or twice, publicly or privately, after 4 days from conviction; (s. 20); (3rd offence), felony. (S. 20).

N.B.—*Cutting, &c., trees, &c., in a park, pleasure-ground, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house, if exc. £1, or elsewhere, if exc. £5, is felony.* (S. 19).

S. *Id.*, s. 21. [One Justice].—(2) *Plants, Fruits, &c., in gardens, &c.*—Unlawfully and maliciously destroying, or damaging with intent to destroy, any plant, root, fruit, or vegetable production, (v) growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory.

P. (1st offence), either impr., with or without h. l., for not exc. 6 cal. m., or else forfeit, over and above injury, not exc. £20, (s. 21); impr. in default of payment, as in offence (1); (subsequent offence), felony. (S. 21).

S. *Id.*, s. 22. [One Justice].—(3) *Roots or Plants elsewhere*.—Unlawfully and maliciously destroying, or damaging with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or inclosed, not being in a garden, orchard, or nursery-ground.

P. (1st offence), either impr., with or without h. l., for not more than 1 cal. m.; or else forfeit, over and above injury, not exc. 20s., and in default of payment, the like impr. for not exc. 1 cal. m., unless sooner paid; (s. 22); (subsequent offence), (Notes (κ) (L), impr. with h. l. for not exc. 6 cal. m., and (if a male and convicted before two Justices), they may further order whipping once or twice, publicly or privately, after 4 days from conviction. (S. 22).

S. 7 & 8 G. IV., c. 30, s. 23. [One Justice].—(4) *Fences, Stiles, Gates*.—Unlawfully and maliciously cutting, breaking, throwing down, or in anywise destroying any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively.

(x) See, *ante*, "Larceny," Note (r), p. 284, as to the application of penalties, which holds good also in the case of offences under this title.

(s) This is the same as Note (g), *ante*, p. 285, "Larceny."

(τ) This is the same as the Appeal clause in Note (x), *ante*, p. 284. (S. 38).

(v) These words do not include young trees. (*E. v. Hodges*, M. & M., 341).

P. (1st offence), forfeit over and above injury, not exc. £5, (s. 23); impr. in default of payment, as offence (1); (*subsequent offence*), impr. with h. l. for not more than 12 cal. m., and w., as offence (1). (S. 23).

S. *Id.*, s. 24. [*One Justice*].—(5) *To other Property*.—Wilfully or maliciously committing any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is by this Act provided. (w)

P. Forfeit, a reasonable compensation for the damage, injury, or spoil committed, not exc. £5; in default of payment, impr., with or without h. l., for not exc. 2 cal. m., unless sooner paid. (S. 24).

(w) *Must be Damage*.—A trespass, however wilful, unless some actual damage be done, is not within this section; (*Butler v. Turley*, 2 C. & P., 585); but, if there be damage, see Notes (r) (q). It is generally considered that where the damage exceeds £5, the Justices have no jurisdiction, although the complainant be willing to reduce his claim to that amount. (Stone's Manual, 249, cited and approved of by Oke, S., p. 280). But this position may be doubted. The Statute in no way fixes the amount of damage as limiting the Justice's jurisdiction. The amount of damage is not, in fact, mentioned. The offence consists in committing "any damage" to property, (for which no remedy is previously provided by the Act); and, if the person charged is "convicted" of the offence, "he is to forfeit and pay such sum of money as shall appear to the Justice a reasonable compensation for the damage, &c., not exceeding the sum of £5." These last words must be taken in connection with "a reasonable compensation." It may be argued that to impose a forfeiture of £5 as a "reasonable compensation" for damage perhaps amounting to £50, would be absurd. But the meaning of the section seems to be that, this being a penal proceeding, (which it is shown to be by the general language of the section, and the power of giving *hard labour* in default of the payment of the forfeiture), if the party aggrieved think fit to bring the case before a Justice, instead of proceeding civilly for damages, he can in no instance recover more than £5 as compensation for the damage done. The Justice's jurisdiction is limited to that extent. He cannot impose a fine of £5 where the damage done is of less amount, for that would not be a "reasonable compensation for the damage" committed; but he cannot go beyond the £5. (*R. v. Harper*, 1 D. & R., 223), whatever the amount of the damage. The complainant may, if he think fit, sue the offender in the Civil Courts, and he would probably elect to do so where the defendant was in a situation to pay damages and costs; but it would seem a still greater absurdity than the one suggested, to hold that a pauper who had a fancy to damage property had only to take care that the amount of damage he did should exceed £5, in order to escape punishment altogether. This, certainly, however, is the view usually entertained. In 1845, a man, out of wanton mischief, broke the Portland Vase at the British Museum, and was taken to the Bow-street Police Court; the amount of damage far exceeded £5,—if, indeed, it could be appreciated at any pecuniary value; but, that the offender might not escape punishment, he was fined £3 for the damage done to the glass case in which the vase was contained, and sentenced to imprisonment in default of payment. As the amount of imprisonment that could be awarded by 7 & 8 G. IV., c. 30, was obviously inadequate for similar offences, the 8 & 9 Vic., c. 44 (of which the Colonial Act 13 Vic., No. 2, is an exact transcript) was passed, making the malicious injury to works of art, &c., in any public museum, &c., a misdemeanor, punishable by six months' imprisonment. This leaves the law as to private property in the same unsatisfactory state. (Arnold's Summary Conviction, p. 278, Note b.) See offence (18), p. 298. This section does not apply to any case where the trespasser acted under a fair and reasonable supposition that he had the right to do the act complained of. The Justice is to judge from all the circumstances as to such alleged claim. (*R. v. Dodson*, 9 A. & E., 704).

The conviction in offences under this Statute must specify the amount in value of the injury done; otherwise, it would be uncertain under which of the sections—19th, 20th, or 24th—the conviction proceeded. (*Charter v. Graeme*, 13 Q. B., 216).

S. Id., s. 31. [*One Justice*].—(6) Any person aiding, abetting, counselling, or procuring the commission of any offence under this title.

P. Liable to the same forfeiture and punishment as a principal offender. (S. 31).

F. 7 & 8 G. IV., c. 30, s. 3. *Bail disc.*—(1) To manufactures, machinery, &c., or forcibly entering house, &c., with intent to commit offence.

P. Tr. life—7 yrs.; or impr. not exc. 4 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 15—5 yrs.

F. Id., s. 4. *Bail disc.*—(2) To threshing or any other machine, &c.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 5—3 yrs.

F. 9 & 10 Vic., c. 25, s. 1, (*adopted by 14 Vic.*, No. 16). *Bail disc.*—(3) To dwelling-house, (person being therein), by gunpowder or other explosive substance.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 15—7 yrs.; (*if female*), impr. 7—3 yrs., h. l. and s. c.

F. 7 & 8 G. IV., c. 30, s. 19. *Bail disc.*—(4) To a tree, sapling, shrub, or underwood, growing in a park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house,—injury exceeding £1.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 5—3 yrs.; (*if female*), impr. 3—1 yr., h. l. and s. c.

F. Id. *Bail disc.*—(5) To a tree, &c., growing elsewhere, injury exceeding £5. See *R. v. Whiteman*, *ante*, p. 294, (Note q) (23 L. J. M. C., 120), *as to how damage estimated*.

P. The same.

F. Id., s. 20. *Bail disc.*—(6) To a tree, &c., wheresoever growing, injury 1s. at the least, after two previous summary convictions. See *ante*, p. 294, S. offence (1).

P. The same.

F. Id., s. 21. *Bail disc.*—(7) To a plant, root, fruit, or vegetable production, growing in a garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, after one previous summary conviction. See *ante*, p. 295, S. offence (2).

P. The same.

F. Id., ss. 6, 7. *Bail disc.*—(8) To mines, by flooding; to airway, engines, staith, building, bridge, waggon-way, &c., of same.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 5—3 yrs.; (*if female*), impr. 3—1 yr., h. l. and s. c.

F. Id., s. 12. *Bail disc.*—(9) To banks or docks, &c., of rivers and canals.

P. Tr. life—7 yrs.; or impr. not exc. 4 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 15—5 yrs.

F. Id., s. 12. *Bail disc.*—(10) To piles for securing sea banks or flood-gates, &c.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 5—3 yrs.

M. Id., s. 15. *Bail comp.*—(11) To the dam of any mill or fish-pond, or putting lime into fish-ponds.

P. The same.

M. *Id.*, s. 13. *Bail disc.*—(12) To public bridges.

P. Tr. life—7 yrs.; or impr. not exc. 4 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 15—5 yrs.

M. *Id.*, s. 14. *Bail comp.*—(13) To turnpike gates, or wall, chain, weighing-machine, house, &c., of same.

P. Fine, or impr., (h. l., and s. c.); or both.

F. *Id.*, s. 10. *Bail disc.*—(14) To ships, whether unfinished or not, with intent to destroy same.

P. Tr. 7 yrs.; or impr. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 5—3 yrs.

F. 1 *Vic.*, c. 89, s. 5. *Bail disc.*—(15) Exhibiting false signals to bring ships into danger, &c., or doing anything else tending to destroy ship.

P. Death.

F. 1 *Vic.*, c. 89, s. 8. *Bail disc.*—(16) Destroying part of a ship in distress, or any goods belonging thereto.

P. Tr. 15—10 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr. 5—2 yrs., h. l. and s. c.

F. 9 & 10 *Vic.*, c. 75, s. 6., (*adopted by 14 Vic.*, No. 16). *Bail disc.*—(17) Throwing gunpowder or other explosive substance into or near any building or vessel, with intent to destroy same, whether or not any explosion takes place, &c.

P. Tr. not exc. 15 yrs.; or imp. not exc. 2 yrs., h. l., s. c., and w.; or (*if male*) h. l. on roads 10—5 yrs.; (*if female*), impr. 5—2 yrs., h. l. and s. c.

M. 13 *Vic.*, No. 2. *Bail comp.*—(18) To scientific and literary collections in Museums, &c.; to pictures in a Church, &c.; or to a statue in a public place, or any mile-stone.

P. Impr. not exc. 6 mths., with or without h. l. and w.

F. 7 & 8 *G. IV.*, c. 30, s. 26; and 9 & 10 *Vic.*, c. 25, s. 10. *Bail disc.*—(19) Accessories *after* the fact.

P. Impr. not exc. 2 yrs., h. l., s. c., and w.

MANSLAUGHTER.

See "MURDER."

Bail disc.—(1) The unlawful killing of another without malice, either expressed or implied, which may be voluntarily, upon a sudden heat, or involuntarily, but in commission of some unlawful act.

P. Tr. life—7 yrs.; or impr. with h. l. not exc. 4 yrs., or fine, (9 *G. IV.*, c. 31, s. 9); or (*if male*) h. l. on roads 15—5 yrs.; (*if female*), impr. 7—2 yrs., h. l. and s. c.

F. 9 *G. IV.*, c. 31, s. 31.—(2) Accessory *after* the fact.

P. Impr. not exc. 2 yrs., h. l.

Describing offence of Murder or Manslaughter, &c.—By 16 *Vic.*, No. 18, s. 4, In any indictment for murder or manslaughter, it is not necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it is sufficient in the former charge to allege that the defendant did feloniously, wilfully, and of malice aforethought, kill

and murder, in the latter charge that he did "feloniously kill and slay," the deceased. Upon an indictment for murder the jury may convict of manslaughter. (2 Hawk., c. 47, ss. 4, 5).

MANUFACTURES.

M. 13 Vic., No. 22, s. 1. (x) Bail comp.—(1) Any person intrusted, for the purpose of manufacture, or for a special purpose connected with manufacture, or employed to make any felt or hat, or to prepare a work of any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, silk, or any such materials mixed one with another, or with any other article, materials, fabric, or thing, or with any tools or apparatus for manufacturing the same, and selling, pawning, purloining, secreting, embezzling, exchanging, or otherwise fraudulently disposing of the same, or any part thereof.

P. Fine and impr., at the discretion of the Court.

M. Id., s. 2. Bail comp.—(2) Any person receiving, accepting, or taking by way of gift, pawn, pledge, sale, or exchange, or in any other manner, of or from any person hired or employed as aforesaid, any such woollen, &c., (see last section), knowing that any such articles, materials, fabric, or thing, as aforesaid, or any such tools or apparatus, are purloined, embezzled, or secreted, as aforesaid, or that the persons offering the same, &c., are fraudulently disposing thereof.

P. The same.

M. Id., s. 3. Bail comp.—(3) Any person intrusted with any of the materials before mentioned, in order to prepare, work up, or manufacture the same, not using all such materials in preparing, &c., and neglecting or delaying for thirty days after such materials shall be prepared, &c., to return (if required, in writing, by the owner of such materials so to do), so much of the said materials as shall not have been used to the person intrusting him therewith, shall be deemed guilty of embezzling, purloining, and secreting such materials.

P. The same.

MARRIAGE.

S. 19 Vic., No. 30, s. 21. [Two Justices].—(1) Any Minister, or person officiating as such, celebrating any marriage, and omitting, by accident or inadvertence, to cause his name, designation, or usual residence to be registered according to this Act.

P. Fine not exc. £20 : to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to the procedure of 5 W. IV., No. 22. See "Justices," No. 2, p. 243.

S. Id., s. 22. [Two Justices].—(2) Any Minister, or person, having celebrated any marriage, and failing to comply with the provisions of this Act, or any of them, respecting the Certificate to be transmitted to the District Registrar.

(x) By s. 4, Any Justice is empowered to issue search or other warrant against the alleged offender. The prosecution must be commenced within six months next after the commission of the offence.

P. Fine £50—£10 : to be recovered as offence (1).

N.B.—*Quakers and Jews*.—Where no person shall have celebrated the marriage, other than the parties thereto themselves, the like penalty shall attach to the husband, in case the Certificate thereby required (x) shall not be duly transmitted

M. 9 Vic., No. 30, s. 17. Bail comp.—(1) Every Minister, District Registrar, or other person celebrating, or professing or attempting to celebrate, marriage in the case of any person under the age of twenty-one years, not being a widower or widow, without such written consent as required by sect. 10, (z) knowing him or her to be under that age, or knowing that the consent produced is not by the appropriate person, or wilfully celebrating, or professing or attempting to celebrate, any marriage in any other case contrary to any of the provisions of this Act, or where any provision of this Act shall not have been complied with, knowing the same not to have been complied with.

P. Fine not exc. £500, alone, or with impr., not exc. 5 yrs.

M. Id., s. 18. Bail comp.—(2) Any person wilfully making any false statement, on oath, or by solemn affirmation, before any Surrogate, District Registrar, or Minister, or before any Justice appointed (see s. 11) under any of the provisions of this Act, or intended or purporting to be.

P. The same as for perjury. See "Perjury."

M. Id., s. 19. Bail comp.—(3) Every person wilfully marrying a person under the age of twenty-one years, (and whom he or she shall know to be under that age), without having previously obtained the written consent of the father or guardian, or (where the mother is competent) of the mother, of the person so under age, or the written consent of some Justice appointed in that behalf;—or inducing or endeavouring to induce any Minister, Registrar, or other person to celebrate marriage between parties, one of whom he or she shall know to be under age, without such consent; and every person abetting or assisting the offender in any such act, knowing the same to be illegal.

(x) By s. 8, Nothing in this Act shall extend to any marriage between parties of whom both shall be Quakers or Jews. Certificate of every such marriage shall, nevertheless, within ten days next following, be transmitted to the Registrar of the district within which it was celebrated, by the person celebrating the marriage, or by one of the parties thereto, stating the date and place of such marriage, and the name, designation, and usual residence of each of those parties. By s. 9, Every marriage celebrated between parties being both Quakers or both Jews, shall be as legal and valid as if duly solemnized under the provisions of this Act, if such marriage was, when celebrated, a valid marriage according to the usages of the Quakers or Jews, as the case may be.

(z) S. 10. If either party to any intended marriage, not being a widower or widow, shall be under the age of twenty-one years, such marriage shall not take place without production to the Minister or Registrar about to celebrate the same, of the written consent of the father of such party, if within the Colony; or, if not within the Colony, then of a guardian appointed by the father; or, if there be no such guardian in the Colony, then of the mother of such party, if within the Colony; or, where there is no such parent or guardian in the Colony, or he or she is incapable of duly consenting, by reason of distance, habitual intoxication, or mental incapacity, then the written consent of some Justice of the Peace, appointed for that purpose: Provided that such Justice shall make inquiry, on oath, as to the facts and circumstances of the case, before giving such consent.

P. Fine not exc. £500, or impr. not exc. 5 yrs., or both.

F. Id., s. 20. Bail disc.—(4) Any person forging, or assisting in forging, or procuring to be forged, (or uttering or assisting in uttering, or causing to be uttered, as true, knowing the same to be forged), any consent or writing purporting to be a consent of or by the father, guardian, or mother of a person under the age of twenty-one years, or to be the consent of a Justice appointed under the provisions of this Act, (s. 10), (A) or any certificate or writing purporting to be a certificate under the provisions of this Act, (Note A), or any copy of a Registry or writing purporting so to be, or signing or transmitting to any Registrar any certificate or writing purporting so to be, containing to his or her knowledge any false statement therein.

P. Impr. with h. l., or h. l. on roads, for term not exc. 5 yrs.

M. Id., s. 21. Bail comp.—(5) Every Minister, or person officiating as such, celebrating any marriage, knowing that his name, designation, or usual residence has not been registered, or is not then duly registered according to this Act.

P. Same as offence (1).



MASTER AND SERVANT.

Magistrates must remember that they are not authorized under any circumstances to exercise any jurisdiction in matters relating to their own servants, or in cases in which they are directly interested.

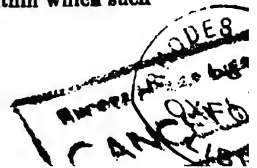
The Master and Servants' Act (20 Vic., No. 28, s. 1) is given in full.

I. The word "Master" shall extend to and include all employers, male or female, of servants, and also agents, superintendents, overseers, or other persons acting for or on behalf of any employer. The word "Servant" shall include all agricultural and other labourers, shepherds, watchmen, stockmen, grooms, all domestic and other servants, artificers, journeymen, handicraftsmen, gardeners, vine-dressers, splitters, fencers, shearers, sheep-washers, reapers, mowers, haymakers, hired and engaged in this Colony, either by verbal or written contract, and all persons engaged in the United Kingdom of Great Britain and Ireland, or in any of the British Colonies, in the British East India possessions, or in Foreign Countries, by indenture, or other written agreement, as shepherds, or labourers, or otherwise.

See *Ex parte Evennett*, (Part III), as to the meaning of the term "servant."

The word "Justices" shall mean any two or more Justices assembled and acting in Petty Sessions, and in open court, in the district or place

(A) S. 7. Every marriage shall be celebrated in the presence of two witnesses at least, who shall sign a certificate, which shall also be signed by the Minister or Registrar celebrating the marriage, and by the parties thereto, and shall be legibly written (or partly written and partly printed) in the Form contained in the Schedule hereto marked (E); and such Minister or Registrar shall deliver a copy of such certificate immediately after the marriage, signed by himself, to one of the parties to the marriage; and the said Minister shall, within one month thereafter, transmit the original certificate to the Registrar of the district within which such marriage was celebrated.



nearest to the district or place where the matter requiring the cognizance of such Justices arises, or where the master and the servant are residing or sojourning when the complaint is made.

The word "cattle" shall include cows, bullocks, bulls, heifers, steers, calves, horses, mares, colts, fillies, foals, asses, mules, sheep, lambs, goats, and swine.

II. If any servant shall contract with any person to serve him for any time, or in any manner, or to perform for him as such servant, a certain work at a certain price, and shall not enter into his service, or commence his work according to his contract, (such contract being in writing and signed by the parties thereto),—or if any servant, having entered into such service or commenced such work, shall absent himself therefrom without reasonable cause, before the term of his contract shall have expired, or before the work contracted for shall be completed, (whether such contract shall be in writing or not), or shall neglect to fulfil the same, or be guilty of any other misconduct or ill behaviour in the execution thereof, such offender, on being lawfully convicted thereof, shall forfeit and pay any sum of money not exceeding £10, and in default of payment, the same shall be levied by distress and sale of the goods and chattels of the offender, and in case no sufficient distress can be found whereon to levy the fine and costs, the offender shall be imprisoned for any period not exceeding fourteen days, or in lieu thereof, at the discretion of the convicting Justices, such offender shall forfeit the whole, or such part of the wages then due as the said Justices shall think fit.

The order must allege either that the contract is in writing, or that it has been entered upon. (See "Justices," No. 2, p. 238, and *ex parte Evennett*, Part III). The forfeiture of wages under this section can only be ordered in case no sufficient distress can be levied, and is *in lieu of imprisonment*. (*Parry v. Trail*, decided on demurrer, 1859).

III. If any servant, after having entered into any contract, either written or parol, with any master to serve him for any time or in any manner, shall obtain from such master any advance of money or goods, on account of the wages for which he shall have so contracted to serve, and shall, after obtaining the same, neglect or refuse forthwith to go to the place at which he shall have so contracted to serve, or shall refuse to perform the work he shall have so contracted to perform, to the extent of the advance of wages so made, without reasonable cause, such servant so offending shall, on being lawfully convicted thereof, be imprisoned, with or without hard labour, for any term not exceeding three months.

Ss. 2 and 3 are limited to cases of contracts between masters and servants for definite time or for specified work; they apply also where the contract is for an undefined time, but determinable on notice. (*Ex parte Tighe*, August 12th, 1858,—see Part III.)

IV. If any servant shall wilfully or negligently spoil or destroy any goods, wares, work, or materials for work, committed to his charge or care, or shall wilfully abandon, lose, or injure any cattle, or any other property belonging to or in the charge of his employer, every such offender, being thereof lawfully convicted, shall forfeit and pay reasonable compensation for such cattle or property so spoiled, destroyed, injured, or lost as aforesaid, and, in default of payment or satisfaction of such damages, shall be committed to

gaol by the convicting Justices for any period not exceeding three months, with or without hard labour, at the discretion of such Justices: Provided that in all cases of negligent injury under this clause, where any compensation shall be assessed against any such offender, the mode of satisfying the same shall be by distress and sale of the goods and chattels of the offender, and in case no sufficient distress can be found whereon to levy the compensation awarded, and costs, the offender shall be imprisoned for any period not exceeding fourteen days.

V. In all cases of wages not exceeding £50, which shall be due and payable to any servant, it shall be lawful for any Justice where, or near to the place where, the service shall have been performed, or where, or near to the place where, the party or either of the parties upon whom the claim is made, shall be or reside, on complaint made to such Justice by such servant, or on his behalf, to summon such party or parties to appear before any two Justices at the nearest Court of Petty Sessions, to answer such complaint, and the Justices there assembled are hereby empowered to examine the parties and their respective witnesses, (if any), touching the complaint and the amount of wages due, and to inspect any agreement or duplicate copy thereof, if produced, and to make such order for the payment of the said wages not exceeding £50, with the costs incurred by the servant in prosecuting such claim, or any damages the servant may have sustained by the neglect of his master to pay the wages so found to be due, as shall to such Justices appear reasonable and just; and in case such order shall not forthwith be obeyed, it shall be lawful for such Justices to issue their warrant to levy the amount of wages awarded to be due, by distress and sale of the goods and chattels of the party on whom such order for payment shall be made, and all the costs, charges, and expenses, including the damages incurred by the servant in the making and prosecuting the complaint, as well as the costs and charges of the distress and levy; and if such levy cannot be made, or shall prove insufficient, then such Justices are hereby empowered to cause the party on whom the order shall be made to be apprehended and committed to gaol, there to remain for any period not exceeding fourteen days, or unless payment shall be sooner made of the amount of the wages so awarded, and of all costs, charges and expenses attending the recovery thereof, or until his estate shall be sequestrated as insolvent, according to law.

S. 5 embraces all contracts, expressed or implied, where wages *have been earned or are payable*, (not exceeding £50), for services of one whose entire time has been engaged, whether as a day labourer or not, and whether hired definitely or indefinitely as to time, or rate of payment. (*Id.*)

VI. It shall be lawful for any Justice residing within the district in which such servant is or hath been employed, upon the complaint of any such servant touching or concerning the non-payment of his wages, to summon the agent, manager, or overseer of such master to be and appear before any two or more Justices, at the nearest Court of Petty Sessions, and the Justices then assembled may hear and determine the matter of the complaint, and make an order for the payment by such agent, overseer, or manager to such servant, of so much wages as to such Justices shall appear to be justly due: Provided that the sum in question do not exceed £50; and in case of refusal or non-payment of any sum so ordered to be

paid by such agent, overseer, or manager; or in case such agent, overseer, or manager shall neglect or refuse to give a draft or order on his master or employer for such sum as the Justices have awarded, with costs, then such Justice or Justices shall and may issue their warrant to levy the same by distress and sale of the goods and chattels of such master or employer.

VII. When any wages shall be paid to any servant by any cheque, draft, order, or note, in writing, upon any bank or any person, and the same shall be dishonoured, no servant shall thereby be deprived of any remedy given to him by this Act for the recovery of his wages, but every such servant shall be entitled to recover such reasonable damages as he may have sustained in consequence of the dishonour of such cheque, draft, order, or note, and such damages shall be recoverable as wages due to such servant in the same way that wages are hereinbefore directed to be recovered.

VIII. If any master shall unlawfully detain or refuse to deliver the clothes, wearing apparel, bedding, tools, or any goods in his possession belonging to any servant, it shall be lawful for any Justice to inquire into the matter of such detention or refusal, on oath, in a summary way, and to make an order for the delivery within such reasonable time as the Justice may appoint, of such clothes, apparel, bedding, tools, or other property; and if any master shall refuse or neglect to obey such order, he shall forfeit and pay a penalty not exceeding £5 for every such offence; and it shall be lawful for such Justice, by warrant under his hand, to cause such effects to be seized and delivered over to such servant.

IX. If any person shall conceal, employ, or retain, or assist in concealing, employing, or retaining any servant who shall have deserted from the service of any master, or otherwise absconded or absented himself from duty, knowing such servant to have deserted or otherwise absconded or absented himself from his duty, or shall cause, induce, or persuade any such servant by words or by any other means whatsoever, to violate or attempt to violate any agreement (whether in writing or not) which he may have entered into to serve with any master, such person so offending shall for every such offence, upon conviction thereof, forfeit and pay a penalty not exceeding £10, or, in case of non-payment thereof, it shall be lawful for the convicting Justices to commit the person so offending to any gaol, for any term not exceeding fourteen days, the said commitment to be determined on payment of the penalty and costs.

X. It shall be lawful for any two or more Justices in any case to hear and determine, in a summary manner, any complaint, difference, or dispute which shall happen and arise between any such servant and his master, and to make such order or award against either party as to such Justices shall seem meet, and every such order or award to enforce by cancelling the Indenture or Agreement between the parties, if the Justices should think fit, or by imposing on either party a fine or penalty proportionate to the offence, but not exceeding the sum of £10, and in default of payment, by execution against the goods, effects, or other property of the party against whom such order or award shall be made; or, in default of sufficient distress, by arrest and imprisonment of such party for any time not exceeding fourteen days.

Under this section, the Magistrates can only cancel the agreement as a means

of enforcing their award; and is an alternative remedy with that of imposing the fine. (*Parry v. Traill*). This section clearly requires amendment.

XI. All offences under this Act shall be heard and determined in a summary way before any two or more Justices in Petty Sessions assembled, as by law or this Act is or shall be provided; and no proceedings under this Act shall be removed by *Certiorari* into the Supreme Court; and all the forms of information, summons, warrants, orders, and convictions under this Act may be prepared in the form required by the Act of Parliament passed in the session of the 11th and 12th years of the reign of Her Majesty Queen Victoria, intituled, "*An Act to facilitate the performance of the duties of Justices of the Peace, out of Sessions, within England and Wales, with respect to Summary Convictions and Orders*;" and no proceedings under this Act shall be invalidated if prepared in any other form which may substantially meet the merits of the case: Provided always that no warrant shall issue for the apprehension in the first instance of any person against whom any charge may be made under the provisions of this Act, unless it be made to appear on oath to the satisfaction of the Justice before whom the complaint is preferred, that the complainant has reasonable cause to believe that the defendant has absconded or removed, or is about to abscond or to remove, from his usual place of abode, or from the district or place in which he has usually resided, and that the complaint of the party making the charge may be thereby defeated.

XII. It shall be lawful for any Clerk of Petty Sessions to issue his summons in any case of complaint under this Act, made to him personally by either master or servant, and every such Clerk of Petty Sessions is hereby authorized to receive such complaint, and in his discretion, having reduced the same to writing and obtained thereto the signature of the person complaining, to issue his summons in the same form and manner as if the same had been issued by a Justice of the Peace; and the same shall have the same force and effect as if made and issued by any such Justice.

XIII. Any complainant or defendant under this Act may be examined as a witness in any case; and in prosecuting any offence under this Act, it shall not be necessary for the purpose of proving any agreement to call any subscribing or attesting witness thereto, or to account for the absence or to prove the hand-writing of any such subscribing or attesting witness, but every agreement may be proved in like manner as if there were no subscribing or attesting witness thereto.

XIV. Nothing in this Act shall authorize the imprisonment of any female.

XV. In cases where the nearest gaol may be at a distance greater than thirty miles, the nearest public lock-up or watch-house may be used as a gaol under this Act: Provided always that nothing herein contained shall authorize the imprisonment in such lock-up or watch-house of any person under this or the said recited Act for a longer period than fourteen days.

MEDICAL PRACTITIONERS.

See "CORONER."

M. 19 Vic., No. 17, s. 3. *Bail comp.*—(1) Any person wilfully,
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knowingly, and corruptly making any false statement upon examination by the New South Wales Medical Board, or in a solemn declaration taken before such Board, or uttering or attempting to utter, or putting off as true before the said Board (or a quorum thereof) any false, forged, or counterfeit diploma, degree, license, certificate, or other document or writing.

P. Impr. not exc. 3 yrs., with or without h. l.

M. Id., s. 4. Bail comp.—(2) Any person fraudulently or by false representations obtaining any certificate as a duly qualified Medical Practitioner, under the provisions of this Act, or the Acts (9 Vic., No. 12; 2 Vic., No. 22, relating to Coroner's Inquests),—or forging, altering, or counterfeiting any such certificate,—or uttering or using any such forged certificate, knowing the same to have been forged,—or falsely advertising or publishing him as having obtained such certificate.

P. The same.

MISCONDUCT.

M. at Com. Law. Bail comp.—Of Officers of Justice.

P. Fine or impr., or both. (Arch. Cr. Pl., 665).

MISDEMEANOR.

See "FELONY," *ante*, p. 117.

MISPRISION OF FELONY.

See "FELONY," *ante*, p. 117.

M. at Com. Law. Bail comp.—Misprision of; (*i. e.*, the concealment of a felony which a man knows, but never assented to; for, if he assented, he would be either a principal or accessory).

P. Fine or impr., or both.

MUNICIPALITIES.

See "BRIBERY."

S. 22 Vic., No. 13, s. 40. [Two Justices].—(1) Any person, being Chairman, or a Councillor or Auditor, continuing to be, or becoming directly or indirectly, by means of partnership with any other person or otherwise howsoever, wilfully or knowingly engaged or interested in any contract or agreement or employment with, by, or on behalf of the Council, except as proprietor or shareholder of any Company contracting as aforesaid. (B)

P. Fine not exc. £100, and not less than £50, and disqualification for 7 yrs. after from holding any office in or under the Council: fine to be recovered either by distress, (11 & 12 Vic., c. 42, s. 19), or according to the procedure of 5 W. IV., No. 22. See "Justices," No. 2, p. 243.

S. Id., s. 45. [Two Justices].—(2) Any person duly qualified and duly elected to the office of Councillor, Chairman, or Auditor, refusing to accept

(B) By s. 85. No person to be liable to incapacity, disability, forfeiture, or penalty, unless the action be commenced within three months after such shall be incurred.

such office by making and subscribing the Declaration (in Sch. D., see s. 44) within thirty days after notice of his election. (Note B)

P. Fine to the Council: £25 in case of Councillor or Auditor; £50 in case of Chairman: recoverable as offence (1).

N.B.—S. 46 provides certain exemptions from the office of Councillor or Chairman.

S. *Id.*, s. 47. [Two Justices].—(3) Any person duly qualified, &c., resigning such office unless ceasing to dwell within the Municipality, or becoming entitled to claim exemption under s. 46. (Note B)

P. Fine the same as in offence (2): recoverable as offence (1).

S. *Id.*, s. 48. [Two Justices].—(4) Any person holding the office of Chairman, Councillor, or Auditor, being absent without leave from the Municipality for more than three months at one time, (unless in case of illness, certified by a duly qualified medical practitioner), except by permanently ceasing to dwell within the Municipality. (Note B)

P. Same as offence (2): recoverable as offence (1).

S. *Id.*, s. 49. (c) [Two Justices].—(5) Any person acting as Chair-

(c) Sections 53—55 provide certain regulations for nuisances.

By s. 58, Every officer intrusted with moneys shall give security, and within seven days, or shorter time appointed, shall pay over moneys received to the Treasurer or some Bank; and, when required, shall deliver a list of persons who have neglected or refused to pay any sums due; and an account of all moneys received, and the vouchers for all payments made, and pay to or receive from the Treasurer or Chairman the balance, (if any); and if he fail to render such account or produce such vouchers or pay over such moneys or balance, or if within seven days after being required, he shall fail to deliver up all books, papers, and property of the Council in his possession, he shall be liable, on proof before any Justice, to be committed to gaol till he perform the act required; and if he still fail or refuse to pay over any such moneys, the Justice may levy the same by distress on his goods and chattels, and in default of sufficient distress may commit him to gaol, without bail, for any time not exceeding three months, unless sooner paid; and on proof that there is probable cause to believe that such officer is about to abscond, such Justice may cause him to be apprehended upon warrant, and on *prima facie* proof on oath of the charge, require bail for his subsequent appearance: provided that no such proceeding shall relieve any surety of the offender from any liability.

Appeal from Rates.—Section 80 enacts that if any person shall think himself aggrieved by the value at which his property is assessed for any rate or assessment, he may appeal against the same to any two or more Justices at the Petty Sessions held within the District in which such property is situated, &c.: provided that the appellant shall give notice in writing to the Council of his intention to appeal seven days at least before the holding of the Court at which such appeal shall be heard.

Rates, &c.—By s. 79, The Council shall annually, within three months after the election of their Chairman, cause an estimate to be made of the probable amount which will be required for the current year, in addition to any tolls, &c., and shall raise the amount so estimated by an assessment of all lands, houses, warehouses, counting-houses, shops, and other buildings within the limits of such Municipality, according to their fair average annual value, whether occupied or not; and notice of such assessment shall be given to the tenant, landlord, proprietor, or occupier of the property so assessed. No rate to exceed the sum of one shilling in the pound of such value; and is payable by the tenant or other person occupying.

And by s. 81, If any tenant, proprietor, or occupier fail, after thirty days' notice, to pay any rate or assessment, the Chairman, on proof of notice having been served personally, or left on the premises for which such rate shall be due, may

man, Councillor, or Auditor, without having made the required Declaration, (see s. 44), or not being duly qualified at time of making same, or acting in or holding any such office after ceasing to be qualified.

P. Fine £50: (to be recovered, with costs, by any elector within 3 mths. after commission of offence). How to be enforced, see offence (1).

S. Id., s. 60. [Two Justices].—(6) Any person wilfully hindering or interrupting, or causing or procuring to be hindered or interrupted, the Council, or their managers, surveyors, agents, servants, or workmen, or any of them, in doing or performing any of the works, or in the exercise of any of the powers and authorities authorized or vested in them by law. (Note B)

P. Fine not exc. £10: recoverable as offence (1).

S. Id., s. 71. [Two Justices].—(7) The Chairman, or any Councillor or Auditor, of any Municipality neglecting or refusing to do any matter or thing which by law he is directed to perform. (Note B)

P. Fine not exc. £10: to be recovered as offence (1)

S. Id., s. 89. [Two Justices].—(8) Any person offending against this Act, or any By-law made thereunder, by refusal, neglect, or otherwise, where no specific penalty shall have been provided. (Note B)

P. Fine not exc. £20: to be recovered as offence (1).

M. Id., s. 29. *Bail comp.*—Any person voting or offering to vote a second time at the same election for any Councillor,—or voting or offering to vote a second time at the same election for any Auditor,—or personating or attempting to personate any other person for the purpose of voting at any such election.

P. Fine or impr., or both.

As to bribery under this Act, see "Bribery."

MURDER.

Murder is the killing of any person *with malice aforethought*, express or implied.

Manslaughter is the felonious killing of another *without malice*, express or implied. The peculiar characteristic of murder as distinguished from manslaughter is malice, either express or implied. Express malice is shown by the case where one kills another with a deliberate mind and formed design, such design being evidenced by external circumstances discovering the inward intention,—as in the case of duelling, which, if it end fatally, is murder. (*R. v. Barronet*, 1 Dears., 51). Implied malice is

issue his warrant to levy the amount by distress and sale of the goods and chattels of such tenant, &c.; and where the proprietor is not the occupier, and the actual tenant fails to pay such rate, and sufficient distress be not found, such proprietor shall be liable to such payment, and to all proceedings for recovery thereof. And any unpaid rate shall remain a charge on the premises for which payable, and may be recovered at any future time, on thirty days' notice being given to the then occupier, by distress and sale of any goods and chattels then found thereon; and the receipt for such over-due rate paid by such tenant shall be a good and sufficient discharge for the amount so paid in payment of the rent.

By-Laws.—By s. 83, All By-Laws shall state some maximum penalty, not to exceed fifty pounds, to be recovered by summary process before two Justices.

malice inferred or presumed by law from any deliberately cruel act committed by one person against another. Thus, if a man kills another suddenly without any, or indeed without some considerable, provocation, the law implies malice; and if A. lays poison for B., which is taken by C., against whom A. had no malicious intent whatever, A. will be guilty of murder. So, if a man throw himself into a river under such circumstances as render the act not voluntary on his part, as if violence be used to the body, or threats which operate on the mind, he is guilty of murder who drove deceased to the act which caused his death, *i.e.*, provided the apprehension were of immediate violence, and apparently well founded. (*R. v. Pitts*, C. & M., 284). So, if two persons mutually agree to commit suicide together, and the means employed to produce death take effect upon one only, the survivor will, in point of law, be guilty of murder. (*R. v. Alison*, 8 C. & P., 418). And if an individual do any act with regard to a human being, helpless and unable to provide for itself, which must necessarily lead to its death, the crime amounts to murder. But if the circumstances were not such that the parties must be aware the result would be death, the offence would be reduced to manslaughter, provided the death was occasioned by an unlawful act, but not such as to imply a malicious mind. For instance, if a person leaves a child at a man's door, where it is likely to be found almost immediately, and taken care of, it would be too much to say that, if the child's death were thence to ensue, the act done would amount to murder. If, on the other hand, it were left in an unfrequented place, on a barren heath, for instance, what inference could be drawn but that the party left it there in order that it might die? (*Per* Coltman, J., *R. v. Walters*, Car. & M., 164; *R. v. Waters*, 2 Car. & K., 864; *R. v. Chandler*, 1 Dears., 453).

Malice, in general, may be said to denote "a wicked, perverse, and incorrigible disposition, (*R. v. Tivey*, 1 Den. C. C., 63), and to emanate from "a heart regardless of social duty, and fatally bent upon mischief;" (*Fost. Disc. Hom.*, p. 257); the term "malice aforethought" being, however, sometimes applied to a state of circumstances involving only malice in a legal sense, and where malice, according to the ordinary signification of the word, does not exist. (*Per* Lord Denman, C. J., *R. v. Tyler*, 8 Car. & P., 620).

Now, it is a very important rule of our law, that all homicide is presumed to be malicious until the contrary is shown; (4 Bl. Com., p. 201); so that any homicide will, in legal contemplation, amount to murder, unless where justified by the command or permission of the law,—excused on the ground of accident, or because done in self-preservation,—or alleviated into manslaughter by concomitant circumstances; (4 Bl. Com., p. 201); and where the question arises whether a homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating it, the solution of the question,—are the facts alleged by way of justification, excuse, or alleviation, true?—is the proper and only province of the jury. But whether—the truth of the facts being assumed—such homicide be justified, excused, or alleviated, must be submitted to the judgment of the Court;—in cases of doubt and difficulty, the jury having a right to state facts and circumstances in a special verdict, and, where the law is clear, being directed by the Judge in regard to it,—matters

of fact being still left to their determination. (Arch. Cr. Pl., 12th ed., p. 145).

Precisely in accordance with the terms in which the above important legal presumption respecting homicide has been stated, is the summing up of Tindal, C. J., in *R. v. Greenacre*, (8 Car. & P., 35, 42), in the course whereof he remarks that "where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder." And in *R. v. Kelly*, (2 Car. & K., 814), Rolfe, B., observes that "*prima facie*, when any man takes away the life of another, the law presumes that he did it of malice aforethought, unless there be evidence to show the contrary;" *i. e.*, to reduce the killing to manslaughter, or to one or other of the inferior species of homicide. (*Per Park, J., R. v. Fisher*).

Various states of facts might readily be suggested which would suffice thus to mitigate the character of homicide. It will, in the first instance, be advisable, however, to observe that the essential distinctions between culpable homicide and such as is justifiable or excusable, as also between the two degrees of culpable homicide, will be found necessarily to depend upon the following considerations, viz., the mind and intention of the party in doing the act which caused death,—the particular occasion of the act, and circumstances attending it,—collateral grounds of legal policy. (Cr. L. Com., 4th Rep., p. 19).

Homicide on Provocation.—A case frequently occurring in practice, which raises difficulty in distinguishing between the legal degrees of guilt attaching to homicide, is, where some degree of provocation having been offered, the question is, whether the homicide shall be accounted murder, or shall be regarded as extenuated by provocation given, and as amounting to manslaughter only. The law, indeed, whilst making allowance for the infirmity of man's temper, ordains that a ferocious excess of violence, far beyond what the particular provocation called for, and which, therefore, cannot be attributed to mere heat and passion so momentarily excited, shall not be held justifiable, but shall be accounted murder; it does not, however, attempt to define, generally, in what circumstances such excess shall be deemed to consist, or to lay down any precise test by which the existence of malice aforethought, which we have seen to be an essential ingredient in the crime of murder, may, in any conceivable case, be affirmed or negatived. If, upon a slight blow given, the party struck returned a moderate blow not likely to prove fatal, and death ensued, these facts would clearly not justify a conviction for murder. If, in a similar case, the offended party were for a great length of time to continue his blows, and not to desist until he had ascertained that life was extinguished, it might thence easily be inferred that the death resulted, not from any sudden heat and passion, caused by the original provocation, but that the excess was attributable only to a deliberate intention to kill. (Cr. L. Com., 4th Rep., p. 25). Nevertheless, between the two extremes here put, intermediate cases may arise, in which the determination of perplexing questions of fact may, subject to judicial comments and advice, be cast upon the jury.

Struggles in anger].—Again, all struggles in anger, whether by fighting, wrestling, or otherwise, are unlawful; (*R. v. Cammiff*, 9 Car. & P., 359); so that if death result to one of the parties engaged in such contest, the individual causing it will be guilty, certainly, of manslaughter, and perhaps even of murder. "When," observes Bayley, J., (*R. v. Whiteley*, 1 Lew. C. C., 175, 176), "persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and, after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a deadly injury, it is manslaughter only. But if a party enters a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder."

Homicide coupled with a Felonious Intention].—There is one peculiar rule of our law with regard to homicide, which requires to be noticed, whereby a felonious purpose, though it be wholly unconnected with any design to occasion death, is made, in conjunction with an accidental killing, to constitute the crime of wilful murder.

Thus, if an individual shooting at a fowl, with an intention to steal it, which intention must be collected from the attendant circumstances, by pure accident kill a person, not even known by him to be near, the felonious intent in shooting at the fowl, when coupled with the fact of a man being killed, renders the individual committing this act legally guilty of the crime of murder; (*Fost. D. H.*, 258); though, if the shooting were done wantonly and without any felonious intent, the act done would thereby amount to manslaughter. (*Fost. Disc. Hom.*, p. 259).

Homicide caused by Undue Correction].—Even where the act upon which death ensues is lawful or innocent, it must be done in a proper manner and with due caution to prevent mischief, in order that the individual thus causing the death of another may be held excused. Thus, parents, masters, and others, having authority in *foro domestico*, may give reasonable correction to those under their care, and if death thence result, without their fault, it will be regarded as accidental. But if the chastisement inflicted exceed the bounds of due moderation, either in degree or in respect of the instrument used, the homicide thus committed will be murder or manslaughter, according to the circumstances of the case. If a schoolmaster correct his scholar with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, he will, if death ensue, be amenable to a charge of manslaughter: if with a dangerous weapon, likely to kill or maim, due regard being had to the age and strength of either party, he may be answerable for murder; (*Per Holt, C. J.*, *R. v. Keite*, 1 Ld. Raym., 144); for the using of a weapon from which death is likely to ensue imports a mischievous disposition, and the law accordingly implies that a degree of malice attended the act, which, if death result from it, will be murder. (*Per Nares, J.*, *R. v. Wiggs*, 1 Leach C. C., 378, n.)

Homicide through negligence].—Further, it is obvious that a person "may be culpable either in the doing of an act rashly, without knowing its nature or probable consequences, or in the careless and incautious

manner of doing it. In the former predicament are all cases where a person unacquainted with the effect of a powerful medicine or drug, administers it to another; or where a person rashly and improvidently presents a gun at another and draws the trigger, not supposing it to be loaded, when it is in truth loaded, and death results." (Cr. L. Com., 7th Rep., p. 26).

So, where it is the plain and ordinary duty of the prisoner to have caused something to be done, and that he, using ordinary diligence, would have had it done, and that, by the omission, the death of the deceased occurred, the prisoner is guilty of manslaughter; and if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter. (*Per Maule, J.*, in *R. v. Haines*, 2 C. & K., 371). So also, where a well is left uncovered in an exposed place, and a child falls into the same and is drowned;—where very young children are left unprotected in the vicinity of a fire, and are burnt to death during the parents' absence;—where a trap-door is left unfastened, and the traveller, who has no means of ascertaining his danger, and avoiding it, falls through the opening and is killed,—are all cases where it is the duty of the Coroner or the Magistrate to commit the person through whose negligence such accidents occur, to take his trial.

And, as a general rule deducible from decided cases, it may be laid down, that where death is caused by negligence, without malice, the person guilty of such negligence will be indictable for manslaughter. (*R. v. Swindall*, 2 Car. & K., 230). If, indeed, a workman employed in the repair of a building, throws stones or rubbish from the house-top, and thereby kills an individual passing underneath, this act will, in the eye of the law, amount to murder, manslaughter, or excusable homicide, according to the degree of precaution taken, and the necessity for taking it. If the act were done without any kind of warning in a public street, at a time when persons were usually passing, this might be esteemed murder;—if at a time when persons were not likely to be passing, it would be manslaughter;—if done in a retired spot, where no persons were in the habit of passing, it would be homicide by misadventure. (See Arch. Cr. Pl., 12th ed., p. 508, and the authorities there cited). So, if a person riding through a street slowly, and using reasonable caution to prevent mischief, rides over and kills a child which is heedlessly crossing the road, the result is purely accidental; but if he had used such speed as, under the circumstances, was not unlikely to occasion accident, the want of caution might render him amenable to a charge of manslaughter; and were he to ride into the midst of a crowd at so furious a rate as that loss of life was likely thence to ensue, and did ensue, he might, by his wilful endangering of life, be guilty of the crime of murder. (Cr. L. Com., 7th Rep., p. 26).

Homicide caused by Negligence of Medical Practitioner.—With reference also to negligent treatment by medical practitioners, it has been observed (*per Maule, J.*, *R. v. Whitehead*, 3 Car. & K., 202, 204), that if a medical or any other man cause the death of another intentionally, that, of course, will be murder; but where a person, not intending to kill a man, by his gross negligence, unskilfulness, and ignorance, causes death, he is guilty of culpable homicide. If, therefore, an operation which results in the death of the patient be performed by one, whether duly qualified or not to act as a surgeon, the questions for the jury will be, first,

whether the deceased died from the effects of the operation performed on him by the accused ; secondly, whether the treatment pursued by the prisoner towards the deceased was marked by negligence, unskilfulness, and ignorance.

Homicide caused by Negligence of Trustees of Road, &c.—But, although the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the guilty party liable to an indictment for manslaughter, this proposition holds true only where the neglect is personal, and the death was the immediate result of that personal neglect. Trustees, therefore, appointed to repair roads under a local Act, are not chargeable with manslaughter if a person using one of such roads is accidentally killed in consequence of the road being out of repair through neglect of the trustees to contract for its due reparation. (*R. v. Pocock*, 17 Q. B., 34). "In all the cases," remarks Erle, J., (*Id.*, 39), "in which a party has been indicted for manslaughter, in causing death by his omission to perform a particular duty, I think the neglect of duty was immediately connected with the death, as in the case of careless driving on a railway, or of not supplying an infant with food. The present case does not fall within this class."

Homicide in resisting Officers of Justice.—Let us now turn for a moment to the consideration of another class of cases, viz., where homicide occurs in the course of resistance offered to the enforcement of public justice. Policy, or rather necessity, obviously requires that every minister of justice should be protected, not only in executing any express sentence of the law, but also in doing every act which the law obliges him to do in the administration and advancement of justice. This principle, which is essential to the existence of the law as an imperative rule of conduct, extends also to the protection of all who either lawfully assist ministers of justice in executing their duties, or who, being mere private persons, legally execute such powers as the law casts upon them for the advancement of justice and the prevention of wrong. See *Cr. L. Com.*, (4th Rep., p. 21). Hence, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and the party making resistance is killed in the struggle, this homicide is justifiable. On the other hand, if the party having authority to arrest or imprison, and using the proper means for that purpose, happens to be killed, all who take part in such resistance will be guilty of murder. (*Fost. Disc. Hom.*, p. 270).

Where a defendant in a civil suit, being apprehensive of an arrest, flies from the officer of justice, who, in pursuing, kills him, this homicide may amount to murder or manslaughter according to circumstances ; for, if the officer, in the heat of pursuit, and merely in order to overtake the defendant, should strike him with a stick or other weapon not likely to kill, and death should thence result, this will at most be manslaughter, and may amount only to accidental homicide ; whereas, if a deadly weapon had been used, it would have been murder. (*Id.*, p. 271).

The remark just made seems, indeed, to hold equally true whether the flight took place through fear of arrest in a purely civil proceeding, or on a warrant for a breach of the peace, or any other misdemeanor. Where, however, a felony having been committed, the felon flies from justice, it is

the duty of every individual present to use his best endeavour to prevent his escape; and if, in the pursuit, the party flying is killed when he cannot be otherwise overtaken, this will be deemed justifiable homicide; for the pursuit was not barely warrantable, but required by the law,—it being, moreover, the duty of an offender quietly to yield himself up to public justice. See *R. v. Dadson*, (2 Den. C. C., 35).

It may readily be inferred from what has been above said, that on a charge of homicide in resisting a lawful arrest, the guilt of the offender may depend entirely on nice and difficult questions belonging to the civil branch of the law, such as the technical regularity of civil process, or the precise duty of a minister of justice in its execution. In any case of the kind alluded to, three points will be found to deserve especial notice, viz.,—the legality of the deceased's authority, (*R. v. Thompson*, 1 Mood. C. C., 80),—the legality of the manner in which he executed it, (*R. v. Cook*, Cro. Car., 537),—and the defendant's knowledge of that authority. If an officer of justice be killed in attempting to execute a writ or warrant invalid on the face of it, (*R. v. Hood*, 1 Mood. C. C., 281), or against a wrong person, or out of the district in which alone it could legally be executed;—or if a private person interfere and act in a case where he has no authority by law to do so, (*R. v. Phelps*, Car. & M., 180);—or if the defendant had no knowledge of the officer's character or business, (see *R. v. Woolmer*, 1 Mood. C. C., 334), or of the intention with which a private person interferes,—and the officer or private person be resisted and killed, the killing will be manslaughter only. A gamekeeper, appointed by a person having only a permission to shoot, and therefore not being, in law, authorized to apprehend the deceased, trying to take a gun from a poacher, and in the scuffle causing a loaded gun to go off, which killed the poacher, was, in a recent case, (1859), (*R. v. Wesley*, 1 Fost. & F., 528), held guilty of manslaughter;—the struggle being considered as one continuous illegal act on the part of the prisoner, and death as resulting from that act. (Arch. Cr. Pl., 12th. ed., p. 510. In pp. 511—516 of that standard Treatise, the particular branch of the Law of Homicide above adverted to is fully considered).

In *R. v. Serva*, (1 Den. C. C., 104), a question somewhat analogous to the above was learnedly discussed, viz., as to the legality of the capture by a British man-of-war of a vessel alleged to be a slaver, and the lawfulness or otherwise of homicide committed by her crew in attempting to regain possession of her after capture from the officer and men placed in charge of her by the Queen's ship. The accused, however, in this case were eventually acquitted, on the ground of a want of jurisdiction in our Courts to try the offence charged.

Homicide, where justifiable.—Homicide, then, may be of various kinds and degrees: it may be *justifiable*, as where a Sheriff executes a criminal in strict conformity with his sentence; or where, as above mentioned, an inferior officer of justice kills a person who forcibly and illegally resists capture, or who attempts the rescue of a prisoner; or where the death of an individual attempting to commit some atrocious crime is caused by the individual whose person or property is threatened by his violence. Where, indeed, a felony is attempted on the person, as robbery or murder, the party assaulted may repel force by force. See *R. v. Huntley*, (3 Car. & K., 142).

A woman in defence of her chastity may lawfully kill an assailant, and if an attempt be made to commit arson or burglary, the owner of the dwelling-house or any member of his family, or even a lodger, may, in preventing the mischief contemplated, lawfully kill the assailant. A mere trespasser, however, on the land of another, although actuated by a felonious intention, could not legally be shot at. (*R. v. Scully*, 1 Car. & P., 319). And if H., finding a trespasser upon his land, beats and thus chances to kill him, he is guilty of manslaughter;—or, if there be added to the above state of facts, circumstances evidencing malice, of murder. (Fost. Disc. Hom., p. 291).

Homicide, where excusable.—Homicide may also be excusable, as where it occurs by misadventure, *i. e.*, where “a man doing a lawful act without any intention of hurt, unfortunately kills another;” (4 Bl. Com., p. 182); as if he were shooting at a mark in a place adapted for that pastime, and under circumstances which rendered it permissible.

So, homicide may by *ignorantia facti* be rendered excusable; as where a man, intending to kill a thief or housebreaker, being in his house, by mistake kills one of his own family. (4 Bl. Com., p. 27). And if a man receiving a drug from an apothecary or chemist, without any reason to suppose it to be other than a salutary medicine, were to administer it, being in truth a deadly poison, his utter ignorance of the fact would excuse him. (Cr. L. Com., 7th Rep., p. 26).

Again, there are cases also in which a man may be excused, who, to protect himself in the course of a sudden broil or quarrel, kills his assailant;—homicide, when excusable under such circumstances, being, however, with difficulty distinguishable from manslaughter. He who, in the case of a homicide by his hand, happening in the course of a mutual conflict wherein he was engaged, would excuse himself upon the ground of self-defence, “must show that, before a mortal stroke given, he had declined any further combat, and retreated as far as he could with safety, and also that he killed his adversary through mere necessity and to avoid immediate death.” Should the accused party fail in these particulars, he will incur the penalties of felonious homicide. (Fost. Disc. Hom., p. 277). A., of malice prepense, discharges a pistol at B., and then runs away; B. pursues him, whereupon A. turns back, and in his own defence kills B.,—this is murder. C., being assaulted by D., returns the blow, and a fight ensues; C., before a mortal wound given, declines any further conflict, and retreats as far as he can with safety, and then in his own defence kills D. This homicide is excusable, as being done in self-defence. (*R. v. Nailor*, Fost. Disc. Hom., p. 278).

The Statute 9 G. IV., c. 31, s. 10, provides that “no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.”

Lastly, in connection with the offence of felonious homicide, and more particularly in regard to the jurisdiction of the Court, and to the functions of the jury on a trial for homicide, the following observations suggest themselves:—

1. *Proof of the Corpus Delicti*.—It is a precautionary rule, recognized on trials for felonious homicide, that proof be required of the finding of the body of deceased; for *tutius semper est errare in acquietando quam*

in puniendo—ex parte misericordiæ quàm ex parte justitiæ. (2 Hale, P. C., p. 290).

This rule, however, is not altogether inflexible, as where the direct evidence brought before the jury is sufficiently strong to satisfy them that murder has really been committed. (*R. v. Hindmarsh*, 2 Leach, C. C., 569).

2. *Death must have occurred within a year and a day*].—It is also a rule, that no person shall be adjudged by any act whatever to have killed another, if that other does not die within a year and a day after the stroke received or cause of death administered, (1 Russ. Cr., 3rd ed., p. 505), *i.e.*, within a year exclusive of the day on which the mortal blow was given, or the cause of death, if poison were used, was administered. (Cr. L. Com., 7th Rep., p. 27).

3. *On Indictment for Murder, Jury may convict of Manslaughter*].—3. Upon an indictment for murder, the accused party may be acquitted of the murder, and yet found guilty of manslaughter, the homicide being the main fact in issue, and the existence of malice prepense in the mind of the accused being a circumstance in aggravation only. See, *per V. Williams, J., R. v. Bird*, (2 Den. C. C., 116). On such an indictment the jury cannot, however, convict of an assault. (16 Vic., No. 18, s. 10).

4. *Accessory before the fact, how punishable*].—Further, it is a principle in law, that "he who procureth a felony to be done is a felon. If present, he is a principal; if absent, an *accessory before the fact*." (Foster, p. 125). Such an accessory was the Earl of Somerset to the murder of Sir Thomas Overbury. (2 How, St. Tr., 965). To a misdemeanor there are no accessories. See *R. v. Clayton*, (1 Car. & K., 128). See "Accessories," p. 2.

As to murder, &c., where the death happens on the sea or in the Colony, see "Admiralty," *ante*, p. 4, and 12 & 13 Vic., c. 96.

F. at Com. Law. Bail disc.—(1) Murder.

[Described by Sir Edward Coke, as "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied"].

P. Death. (9 G. IV., c. 31, s. 3).

F. at Com. Law. Bail disc.—(2) Accessory after the fact.

P. Tr. life, or impr. not exc. 4 yrs., h. l.; (9 G. IV., c. 31, s. 3); or (*if male*) h. l. on roads 15—7 yrs.; (*if female*), impr. 7—3 yrs., h. l. and s. c.

MUTINY (INCITING TO).

(See 37 G. III., c. 70).

NATIVE-DOG ACT.

(See 16 Vic., No. 44).

NATURALIZATION OF ALIENS.

By 17 Vic., No. 8, The following oath is required to be taken by Aliens to whom any of the rights and capacities of a natural-born British subject within this Colony shall be granted :—

"I, A. B., do sincerely promise and swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, as lawful Sovereign of the United Kingdom of Great Britain and Ireland, and of this Colony of New South Wales, dependent on and belonging to the said United Kingdom; and that I will defend her to the utmost of my power against all traitorous conspiracies and attempts whatever which shall be made against her Person, Crown, and Dignity; and that I will do my utmost endeavour to make known to Her Majesty, her Heirs, and Successors, all treasons and traitorous conspiracies and attempts which I shall know to be against Her or any of them. So help me God.

"Taken and subscribed the _____ day of _____ 186____,
"Before _____."

By s. 3, Such oath shall and may be administered and taken either by and before one of the Judges of the Supreme Court, or by and before any Police Magistrate, or any Bench of Magistrates assembled in Petty Sessions, or by or before any person to whom one of the Judges of the said Supreme Court shall have deputed authority to administer such oath, (as the said Judges are respectively hereby empowered to do); and thereupon the Judge, Police Magistrate, Bench of Magistrates, or deputed person, before whom such oath shall have been so taken, shall sign and deliver to the party taking the same, a Certificate of the same having been so taken and subscribed by him, and shall forthwith transmit the said oath to the Prothonotary of the Supreme Court, for the purpose of being kept among the Records of the said Court.

NAVAL SERVICE (COLONIAL).

(See 19 Vic., No. 22).

NEWSPAPERS.

See "PRINTER (LICENSED)".

NUISANCES.

See "POLICE."

M. at Com. Law. Bail comp.—Obstructing highway, river, bridge; non-repairing same; carrying on offensive trade; keeping a fierce dog or a bull loose; and numerous others, for which see "Disorderly House," p. 79, and "Gaming Houses," p. 126.

P. Fine or impr., or both; and nuisance to be abated if continuing.
(Arch. Cr. Pl., 715).

OATHS.

Justices' Power to administer Oaths].—There does not appear, upon an examination of legal authorities, to have been any general power by statute in a Justice of the Peace to administer an oath, or take an affidavit, before the passing 9 Vic., No. 9; although it was considered that, in all cases where a Magistrate has power to hear evidence, he has incidentally a power to administer an oath to the party who gives it. (5 B. J., 250).

That Statute (s. 7) prohibits Justices from administering oaths touching matters whereof they have no jurisdiction by statute, except in cases therein provided for.

The Justices, however, have a general power to administer an oath to witnesses in summary proceedings, and on charges of indictable offences. See 11 & 12 Vic., c. 42, ss. 3, 8, 11, 16, & 17, and *Id.*, c. 43, ss. 2, 7, 15, & 16.

Power to administer Oath implied from power to hear and determine.]—By the Acts Shortening Act, 16 Vic., No. 1, s. 12, Whenever any Court, Judge, Justice, Officer, Commissioner, Arbitrator, or other person shall be authorized by law, or by consent of parties, to hear and determine any matter or thing, such Court, Judge, Justice, Officer, Commissioner, Arbitrator, and other person shall have authority to receive and examine evidence, and are hereby empowered to administer an oath to, or take an affirmation from, all such witnesses as are legally called before them respectively.

Declaration in lieu of an Oath.]—9 Vic., No. 9, and 22 Vic., No. 7, contain the following provisions relative to the duties of Justices of the Peace:—

Oath Prohibited.]—Sect. 7 of 9 Vic., No. 9, recites "That a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the Justice of the Peace, or other person, by whom such oaths or affidavits have been administered or received;" and that "doubts have arisen whether or not such proceeding is illegal;" "for the more effectual suppression of such practice and removing such doubts," enacts "That from and after the commencement of this Act, it shall not be lawful for any Justice or other person to administer, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such Justice or other person hath not jurisdiction or cognizance, by some Statute, Act, or Ordinance in force at the time being."

Exception of Foreign Countries.]—"Provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any Justice, in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any inquiry held before any Justice in the nature of Coroners' Inquests respecting sudden deaths, or touching any proceedings before the Legislative Council, or any Committee thereof; nor to any oath, solemn affirmation, or affidavit which may be required by the laws of any foreign or other country out of New South Wales, to give validity to instruments in writing designed to be used in foreign or other countries respectively." (S. 7).

To take Declaration of Execution of Wills or Deeds.]—By s. 8, Any attesting witness to the execution of any will or codicil, deed, or instrument in writing, or any other competent person, may verify and prove the signing, sealing, publication, or delivery of any such will, &c., by such declaration in writing.

Declarations in Cases not specially provided for.]—By s. 9, That, whereas it may be necessary and proper, in many cases not herein speci-

fied, to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters, it is enacted, that any Justice, Notary Public, or other officer now by law authorized to administer an oath, may take and receive the declaration of any person voluntarily making the same before him, in the Form of the Schedule to this Act annexed.

Form of Declaration].—By s. 11, In all cases where a declaration in lieu of an oath shall have been substituted by this Act, or by virtue of any power or authority hereby given, or where a declaration is directed or authorized to be made and subscribed under the authority of this Act, or of any power hereby given, although the same be not substituted in lieu of an oath heretofore legally taken, such declaration shall be in the form prescribed in the Schedule, unless otherwise directed by the powers hereby given.

Schedule referred to by the foregoing Act.

I, A. B., do solemnly and sincerely declare that
and I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the ninth year of the reign of Her present Majesty, intituled, "*An Act for the more effectual abolition of Oaths and Affirmations taken and made in various departments of the Government of New South Wales, to substitute Declarations in lieu thereof, and for the suppression of voluntary and extra-judicial Oaths and Affidavits.*"

For the purpose of simplifying oaths of qualification for office, it is provided by 20 Vic., No. 9, s. 1, In every case where but for this Act it would be necessary for any person to take the Oaths of Allegiance, Supremacy, and Abjuration, or any of them, or the oath prescribed by the Roman Catholic Relief Act, or to make the declaration prescribed by 9 G. IV., c. 17, it shall be sufficient for such person to take, in lieu thereof, the oath set forth in the first Schedule to this Act: anything in the said Acts, or in any other Statute, Act, or Law, notwithstanding.

By s. 2, Where, by any law now in force, the said oaths may be taken before the Supreme Court, or before a Judge, or are required to be taken in open Court, the oath prescribed by this Act may be taken and subscribed at any hour before the said Court, or any Judge thereof, or before any Circuit Court or Court of Quarter Sessions, or any Justice of the Peace authorized by writ of *Dedimus Potestatem* for that purpose.

By s. 3, The oath of office to be hereafter taken by Judges and Justices of the Peace shall, in lieu of the oath heretofore taken by them, be the oath set forth in the second Schedule.

By s. 5, Every person who now is or hereafter shall be by law entitled to make affirmation, in lieu of an oath, may make affirmation in the Form by this Act prescribed, with the words "*solemnly and sincerely promise and affirm,*" instead of "*sincerely promise and swear,*" in the 1st and 2nd Schedules.

First Schedule.

(OATH OF ALLEGIANCE).

I, A. B., do sincerely promise and swear that I will be faithful and bear true Allegiance to Her Majesty Queen Victoria as Lawful Sovereign of the United Kingdom of Great Britain and Ireland, and of this Colony of New South Wales, belonging to and dependent on the said United Kingdom, and

to her Successors in the Sovereignty of the said United Kingdom. So help me God.

Second Schedule.

I, A. B., do sincerely promise and swear that, as a Judge of the Supreme Court of New South Wales, (or as the case may be), or as a Justice of the Peace for the Colony of New South Wales, or the City or District of in the Colony of New South Wales, I will, at all times, and in all things, do equal justice to the poor and the rich, and discharge the duties of my office according to the laws and statutes of the Realm and of this Colony, to the best of my knowledge and ability, without fear, favour, or affection.

F. 52 G. III., c. 104, s. 1. Bail disc.—(1) Oaths (unlawful).—Administering, or causing to be administered, any oath to commit any treason or murder, or any felony punishable by law with death

P. Tr. life—15 yrs., or impr. not exc. 3 yrs., h. l. and s. c., (1 Vic., c. 91, s. 1), or h. l. on roads 15—7 yrs.

F. Id. Bail disc.—(2) Taking same without being compelled.

P. Tr. for life, or such time as Court shall adjudge.

F. 37 G. III., c. 123, s. 1. Bail disc.—(3) Administering, or causing to be administered, or present at the administering of, any oath to disturb the public peace, or to engage in seditious purposes, &c., or taking same without being compelled.

P. Tr. not exc. 7 yrs., or h. l. on roads 5—3 yrs.

M. 9 Vic., No. 9, s. 7. Bail comp.—Oaths (voluntary).—Justice of the Peace or other person administering a voluntary oath. (D)

P. Fine or impr., or both.

OBLITERATING RECORDS.

See "LARCENY."

OBSCENE BOOKS.

See "INDECENCY," "VAGRANT."

OBTAINING MONEY UNDER FALSE PRETENCES.

See "FALSE PRETENCES."

OFFICE.

M. 5 & 6 Ed. VI., c. 16; 49 G. III., c. 126, s. 3; 6 G. IV., c. 105, s. 10. Bail comp.—Buying or selling of offices, or soliciting for money, &c.

P. Fine or impr., or both; and see R. v. Bowen, 1 B. & C., 585.

PARKS (PUBLIC).

18 Vic., No. 33].—An Act for the Regulation and Protection of Parks and other places of Public Recreation, &c.

S. 5 provides, That the Trustees appointed under this Act shall make such Rules and Regulations for the protection of the shrubs, trees, and

(D) A Justice had sworn witnesses in a matter of complaint before the Bishop of Exeter as to the conduct of two clergymen, and he was held to have brought himself within the similar Imperial Enactment, and was imprisoned on conviction at the Exeter Assizes. (*R. v. Nott*, Car. & M., 288).

herbage growing on such lands, and for regulating the use and enjoyment of the same, and for the removal of trespassers thereon, and other parties causing annoyance, &c., as shall seem necessary and expedient; and, for the enforcement of any such rules and regulations, to impose fines, not in any case to exceed the sum of £10, for the breaches thereof respectively: to be approved of by the Governor and Executive Council, and posted conspicuously on said land, and published in *Government Gazette* for at least one week before being enforced.

The aid of the Police may be called in, if necessary, to remove persons committing a breach of said regulations, or causing annoyance, &c. (S. 6.)

All fines and penalties recovered under this Act, or any rule or regulation in pursuance thereof, shall be paid to the Trustees, if the proceedings shall have been taken by them, and if taken by any other person, then one-half to such person, and one-half to the Trustees. (S. 7.) All fines and penalties may be recovered before any Justice, in a summary way. (S. 8.)

PAWNBROKERS (LICENSED).

S. 13 *Vic.*, No. 37, s. 1. [*One Justice*].—(1) Any person carrying on the trade or business of a pawnbroker, (e) without having first obtained a license.

P. Fine not exc. £20: to be recovered either by distress, (s. 19 of 11 & 12 *Vic.*, c. 43), or according to 5 W. IV., No. 22. See "*Justices*," No. 2, p. 243.

S. *Id.*, s. 5. [*Two Justices*].—(2) Every Clerk of Petty Sessions by which the license is granted, neglecting to keep an alphabetical record thereof. (f)

P. Fine not exc. £5: recoverable as offence (1).

S. 13 *Vic.*, No. 37, s. 8. [*Two Justices*].—(3) Any licensed pawnbroker failing to have his name painted at length, in legible characters, at least two inches deep, with the words "*Licensed Pawnbroker*," constantly and permanently remaining, and plainly to be seen and read, over the door of his shop made use of for carrying on such business.

P. Fine not exc. £10: recoverable as offence (1).

S. *Id.*, s. 9. [*Two Justices*].—(4) Any unlicensed person keeping up any sign, writing, painting, or other mark on or near to his premises, &c.,

(e) By s. 2, Every person who shall carry on business, &c., in or by advancing upon interest, or for or in expectation of profit, gain, or reward, any sum of money upon security (whether collateral or otherwise) of any articles, &c., taken by such person by way of pawn, pledge, or security, shall be deemed a pawnbroker within this Act. Applicant for license to be recommended by five householders residing in the district. (*Vide* Schedule A. to this Act). License (in form in Schedule B.) to be in force for one year from date, and to be delivered on payment by applicant of Ten pounds. (S. 3). The matter of all applications to be a judicial inquiry. (S. 4). (*The necessary Forms will be found in this Volume, post, Part II.*)

(f) *Proof of License*.—By s. 6, In any proceeding before any Justice, the production of the alphabetical record kept by Clerk of Petty Sessions, as required by s. 5, shall be *prima facie* evidence of the personal identity of the party named, and of his being licensed; and, by s. 7, In all proceedings for carrying on a pawnbroker's business without a license, any person shall be held unlicensed unless he produce his license, or other satisfactory proof of his being licensed.

which may imply that such premises, &c., are the premises, &c., of a licensed pawnbroker.

P. Fine not exc. £10: recoverable as offence (1).

N.B.—*A separate license to be taken out for each house, shop, and other place.* (S. 10). *Partners in one shop only require one license, &c.* (S. 11). *The name of each partner must be put up.* (2 C. & M., 274). *An agreement for secret partnership is illegal and void.* (3 M. & K., 45).

S. *Id.*, s. 12. [*One Justice*].—(5) Any licensed person refusing or neglecting to produce his license, on demand at his licensed house, or place where such license is exercised, to any Justice, or constable authorized in writing by a Justice to make such demand.

P. Fine not exc. £10, (unless reasonable excuse be given); fine recoverable as offence (1).

S. *Id.*, s. 13. [*One Justice*].—(6) Any licensed person lending his license to any other person for the purpose of carrying on such pawnbroker's business under colour thereof.

P. Fine not exc. £25: recoverable as offence (1); and, on conviction, such license may be declared void, and no license to be granted to such party for two years from date of conviction.

S. *Id.*, s. 15. [*Two Justices*].—(7) Any licensed person failing or neglecting to keep the book (required by s. 15), (a) or to make the required entry therein.

P. Fine not exc. £10: to be recovered as offence (1).

N.B.—By *Fergusson v. Norman*, (5 B. N. C., 76), if the pawnbroker fails to make entries of the goods pledged to him, no property in the goods vests in him, nor has he any lien for the money advanced upon them.

S. *Id.*, s. 16. [*Two Justices*].—(8) Any pawnbroker, under any circumstances, or upon any pretence, selling or otherwise disposing of, or causing or knowingly suffering to be sold or disposed of, any article pawned, before the expiration of three months, or of such longer period (if any) as was agreed on.

P. Fine not exc. £20: to be recovered as offence (1); besides damages, to which he may be liable to the owner or party injured.

N.B.—*Any longer time for redemption than three months to be specified in the entry and on the duplicate. Any agreement for the forfeiture of any article before the expiration of six (?) months is void.* See *Walter v. Smith*, (5 B. & A., 439).

S. *Id.*, s. 17. [*Two Justices*].—(9) Any pawnbroker neglecting to insert twice in some public newspaper, published in the Colony, four days at least before the proposed day of sale of articles forfeited, a notice of such sale, containing a catalogue of all such articles, and the time when the same were respectively taken in pawn.

(a) *Articles pledged to be entered in Books*.—By s. 15, Every pawnbroker taking in pawn any article, whereon shall be lent money, shall forthwith (*before advancing any money thereon*) cause to be entered, in a fair and legible manner, in some book kept for that purpose, a fair and reasonable description of every such article, and the sum of money in the whole advanced thereon, with the rate of interest to be charged on the same by the week or month, (as the case may be), and the true date at which, and the name of the party by or for whom, such article is pawned, and the residence of the party pawning, according to the statement, into which the pawnbroker is enjoined to inquire.

P. Fine not exc. £20,—recoverable as offence (1),—to owner of articles sold.

N.B.—*All forfeited pledges for any sum above 5s. shall be sold by auction only. No purchase of any pledge by any pawnbroker, or person on his behalf, shall be lawful or valid against the owner.* (S. 17).

S. *Id.*, s. 18. [Two Justices].—(10) Any licensed pawnbroker failing or neglecting to give to the party pawning a duplicate of the entry, fairly and legibly written, or partly written and partly printed, with the signature of the pawnbroker thereto attached, containing every particular inserted in the original entry, and corresponding therewith in number.

P. Fine not exc. £10: recoverable as offence (1).

N.B.—*No pawnbroker to receive a pledge unless duplicate (to be given gratis) be received by the party depositing it, to be produced to the pawnbroker before such pledges are re-delivered.* (H)

S. *Id.*, s. 24. [Two Justices].—(11) Any pawnbroker, or person employed by a pawnbroker, refusing to permit any person pawning any article, his agents or assigns, (s. 23.), to inspect the entry of the sale thereof, (such person producing the duplicate relating to the article respecting which such inspection is required), or not producing the book containing such entry, or in any manner offending against the provisions of section 23. (I)

(H) *Holders of Duplicates deemed Owners*].—By s. 21, Holders of duplicates are to be deemed owners of goods pawned, and entitled to redeem them, unless pawnbroker have notice of loss or theft of such duplicate, or be informed that the goods were stolen; and where a pawnbroker refuses to deliver the goods to holder of duplicate, he shall give immediate information thereof to a Justice or constable, with a description of the person of such party, and (if known) his name and residence. By s. 22, When duplicate is lost or mislaid or stolen, and the goods are unredeemed, the pawnbroker shall deliver a copy of the duplicate to any person professing to be the owner, on his producing a written declaration taken before a Justice, accounting for the non-production of such duplicate. See "Oaths," p. 317.

(I) By s. 23 it is enacted, That every pawnbroker shall enter in a book a true account of every article pawned and sold or otherwise disposed of,—specifying when and by whom the same was pledged, and the true number of the entry made, and also when and for what amount the same was sold; and, if sold for more than the full amount of principal and interest due at the time of sale, the overplus (deducting the necessary charges of sale) shall, if claimed within twelve months after sale, be paid on demand to the person who pawned such article, or to his agent or assigns or executors. (S. 23).

Justices to order Restitution].—By s. 29, If any articles be stolen or unlawfully obtained, or, if lawfully obtained, be unlawfully pawned, sold, or exchanged, and complaint be made to any Justice that such goods are in possession of any pawnbroker, such Justice may issue a summons or warrant for the appearance of such pawnbroker before any two Justices, and for the production of the goods; and such two Justices may order such goods to be delivered up to the owner, either without any payment, or on payment of such sum, at such time, as they shall think fit; and every pawnbroker, when so ordered, refusing or neglecting to deliver up the goods, or disposing of the same after notice that such goods were stolen or unlawfully obtained, shall forfeit to the owner the full value, to be determined by the said Justices; (s. 29); and, by s. 30, any goods unlawfully pawned, &c., the ownership of which shall be established, may be ordered to be delivered up to the owner, either with or without compensation.

Suspicious Pawning].—If any person offer by way of pawn, exchange, or sale, any articles, and be unable or refuse to give a satisfactory account of him- (or her-) self, or how he (or she) obtained such articles, or wilfully give false information as to ownership of such articles, or of his (or her) name or place of abode, or of

P. Fine, not exc. £10 : to be recovered as offence (1).

S. Id., s. 25. [Two Justices].—(12) Any licensed pawnbroker, or any agent or servant employed by any such pawnbroker, purchasing, receiving, or taking in pawn any article whatever from any person apparently under the age of fourteen years, or apparently intoxicated with liquor, or (in any case where the value of the pledge, or the amount agreed to be lent thereon, does not exceed £10), advancing upon any article or articles pawned, or offered in pawn, anything but money, or in respect of any such article or articles, giving, selling, or exchanging any goods or property in lieu of or in return for money.

P. Fine not exc. £10 : recoverable as offences (1).

S. Id., s. 26. [One Justice].—(13) Any pawnbroker not attending when summoned to attend and produce any book, note, voucher, entry, memorandum, license, or other paper, before any Justice, or not producing to him any book, duplicate, or entry required to be kept by this Act, or producing the same in an altered state, and not showing a reasonable excuse in that behalf.

P. Fine not exc. £10 : to be recovered as offence (1).

S. Id., s. 27. [Two Justices].—(14) Licensed pawnbroker receiving or taking in, or permitting or suffering to be received or taken in, any goods or chattels by way of pawn, pledge, or in exchange, before eight of the clock in the forenoon, or after nine of the clock in the evening, excepting only until eleven of the clock on the evenings of Saturday throughout the year, and the evenings next preceding Good Friday and Christmas Day.

P. Fine not exc. £10 : to be recovered as offence (1).

S. Id., s. 28. [Two Justices].—(15) Any pawnbroker in any way

owner's name or place of abode, or if there be any other reason to suspect that such articles are stolen or illegally obtained,—or if any person not entitled to redeem any articles in pawn shall attempt to redeem the same,—any pawnbroker to whom such articles shall be so offered, or with whom such articles are in pledge, may detain such person and the said articles, and may deliver such person into the custody of a constable, who shall convey such person and the said articles before some Justice, who, if, on examination, he have cause to suspect that such articles were stolen or illegally obtained, or that the person offering to redeem the same had not any right so to do, may commit such person into custody for such time as shall be necessary for obtaining further information; and if, on either of the said examinations, it shall appear to the satisfaction of such Justice that the said articles were stolen or illegally obtained, or that the person offering to redeem the same have not any right so to do, such Justice shall commit the party offending to any gaol or house of correction, to be dealt with according to law, where the nature of the offence shall authorize such commitment by any other law; and where it shall not so authorize such commitment, then such commitment shall be for any term not exceeding three calendar months, at the discretion of such Justice. (S. 31).

Appeal.—By s. 32, Any person aggrieved by any summary conviction under this Act, may appeal therefrom in the manner provided by 5 W. IV., No. 22; (see "Appeal," ante, p. 7): Provided that, in all cases where any penalty imposed is recoverable before any Justice or Justices, any Justice to whom any complaint shall be made shall summon the party complained against, and any Justice is empowered to hear and determine the complaint, and adjudge the offender to pay the penalty incurred, although no information in writing shall have been exhibited; and all such proceedings by summons without information shall be as good and valid as if an information in writing had been exhibited.

carrying on or exercising his trade or business on any Sunday, Christmas Day, or Good Friday.

P. Fine not exc. £10: to be recovered as offence (1).

S. 13 Vic., No. 37, s. 32. [*Two Justices*].—(16) Any pawnbroker in any respect offending against this Act, or any provision therein, (where no other penalty is specifically imposed).

P. Fine not exc. £20: to be recovered as offence (1).

M. 13 Vic., No. 37, s. 14. *Bail comp.*—(1) Any person forging, counterfeiting, or altering, or causing to be forged, counterfeited, or altered, any license; or producing or showing any such forged, counterfeited, or altered license to any person entitled to demand the production thereof.

P. Fine or impr. not exc. 2 yrs., with or without h. l., or both.

M. *Id.*, s. 19 *Bail comp.*—(2) Any person knowingly pawning, pledging, exchanging, or otherwise unlawfully disposing of any article belonging to some other person, without the consent or authority of such owner, and with a fraudulent intent.

P. The same.

M. 13 Vic., No. 37, s. 20. *Bail comp.*—(3) Forging or altering any duplicate, or uttering, selling, disposing of, or putting off any duplicate so forged or altered, (knowing the same to be so forged or altered), with intent to defraud.

P. The same.

M. *Id.* *Bail comp.*—(4) Stealing or unlawfully taking any duplicate with a fraudulent intent to deprive the owner thereof, or of any article specified therein.

P. The same.

PERJURY. (κ)

Perjury is, by Common Law, the assertion of a falsehood upon oath in a judicial proceeding respecting some fact material thereto, or to the point to

(κ) *Mode of Prosecution for Perjury*.—By the decision in *R. v. Bartlett*, 12 L. J. M. C., 127, a Justice has no power to commit for perjury at Common Law; but now, since Jervis's Act, 11 & 12 Vic., c. 42, he may do so for any "indictable offence." (See *ante*, p. 174). Since the latter Act, however, the course of proceeding in cases of perjury and subornation of perjury has been specially provided for by the 16 Vic., No. 18, s. 19, set out *ante*, p. 231. See "*Justices*," No. 2. Sections 20, 21, 22, relate to the form of the indictment, &c. No depositions of witnesses will be necessary to be taken under the enactment 16 Vic., No. 18, s. 19, as in ordinary cases of commitment for trial; but, if the prosecution should not be made under it, it may be commenced in the usual way, by an information, warrant, and depositions, as in ordinary cases of indictable offences. A Form of commitment for perjury before Justices in Petty Sessions will be found among the Forms *post*, Part II. The frequency of prosecutions for perjury by unsuccessful litigants in this Colony, indicates the necessity of requiring some kind of certificate by the presiding Judge, &c., before whom the alleged perjury is said to have been committed, that there is reasonable cause for commencing the prosecution. It is to be feared that, as the law is at present, such prosecutions are not uncommonly mere instruments of intimidation or revenge. See the recent Imperial Act, 22 & 23 Vic., c. 17.

Where more than one offender is charged, there must be separate examinations, as the words uttered by one cannot possibly be applied to those which proceed from

be decided in such proceeding, the characteristic of this offence being not the violation of the religious obligation of an oath, but the injury done to the administration of public justice by false testimony. For "the law takes no notice of any perjury but such as is committed in some Court of Justice having power to administer an oath, or before some Magistrate, or proper officer invested with a similar authority, in some proceeding relative to a civil suit or a criminal prosecution." (4 Bl. C., 137). It esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. (*R. v. Phillpotts*, 2 Den. C. C., 306; *R. v. Millard*, 1 Dears., 166).

N.B.—*The oath must be taken*,—1. *In a judicial proceeding*; 2. *Before a competent jurisdiction*; 3. *It must be material to the question depending*; 4. *It must be false, or not known by defendant to be true*; and 5. *It must be taken deliberately and intentionally*.

M. at Com. Law. Bail disc.—(1) Perjury and subornation of perjury at Common Law.

P. Fine and impr. (with h. l., 3 G. IV., c. 114), and (by 2 G. II., c. 25, s. 2), tr. or impr. and h. l. for not exc. 7 yrs.; and the Court may direct the offender to be kept to h. l. in irons for not exc. the first 3 yrs. of his sentence. (11 Vic., No. 34, s. 1).

M. 5 Eliz., c. 9, s. 3. Bail disc. (See 16 Vic., No. 18, s. 19).—(2) Perjury by statute.

P. The same.

MEM.—*There are various other offences of this character, punishable under particular Statutes.*

PERSONATION.

See "BRIBERY," "MUNICIPALITIES," "ELECTORAL ACT."

PIRACY. (L)

F. at Com. Law. Bail disc.—(1) At Common Law. (4 Bl. C., 72).

another. See *Young v. R.*, (3 T. R., 103, 104); *R. v. Phillips*, (2 Stra., 921); 2 Hawk., c. 25, s. 89.

False Oath, or Affirmation, or Declaration, punishable.—By 16 Vic., No. 1, s. 18, In all cases in which an oath or affirmation shall be authorized to be administered or taken, any false evidence given by a party to whom such oath shall have been administered, or who shall have made such affirmation, shall be deemed to be a misdemeanor, and punishable as perjury; and in all cases where a solemn declaration shall be required to be taken, or authorized to be received, a false declaration made by any person shall be deemed to be a misdemeanor, and punishable with fine or imprisonment, at the discretion of the Court before which such misdemeanor shall have been tried.

(L) *Piracy at Common Law and by Statute*.—The offence of Piracy at Common Law is nothing more than robbery upon the high seas; but, by Statutes passed at various times, and still in force, many artificial offences have been created. (Boothby's Synopsis, 2nd ed., p. 347). Those other offences which are declared piracy are: acts of hostility by a subject of this realm against a subject at sea, under colour of a foreign commission; (11 & 12 Will. III., c. 7, s. 8; 18 Geo. II., c. 33, s. 1); forcibly boarding a merchant ship, and throwing overboard or destroying the goods; trading with pirates, or fitting out a vessel for that purpose; (8 Geo. I.,

P. The same as if a robbery committed on land, (7 & 8 G. IV., c. 28, s. 2, & 1 Vic., c. 87, s. 5). See "Larceny."

F. 7 W. IV. & 1 Vic., c. 88, s. 2. *Bail disc.*—(2) See Note (L).

Whosoever with intent to commit, or at the time of, or immediately before or after, committing the crime of Piracy in respect of any ship or vessel, shall assault with intent to murder any person on board of or belonging to such ship or vessel, or stabbing, cutting, or wounding such person, or doing any act whereby the life of a person may be endangered.

P. Death.

F. *Id.*, s. 4. *Bail disc.*—(3) Accessory after the fact.

P. Impr. not exc. 2 yrs., h. l. and s. c. See "Admiralty," p. 4.

POISON (ADMINISTERING).

See "ATTEMPTS TO MURDER," &c., *ante*, p. 28.

POLICE (LAND) ACTS. (M)

The operation of these Acts is limited to Parramatta, Windsor, Mait-

c. 24, s. 1); Master or seamen running away with the ship or goods, or laying violent hands on, or confining the Master, or making a revolt in the ship, (11 & 12 Will. III., c. 7, s. 9); dealing in slaves upon the high seas, or in any place where the Admiral has jurisdiction, except as mentioned, (5 Geo. IV., c. 113);—these offences are now punishable by 7 Will. IV., & 1 Vic., c. 83, s. 3., by transp. life—15 years; or impr. not exc. 3 years, h. l. and s. c. (Oke, S., 600).

(M) 2 Vic., No. 2. *Justice to suppress Riots, &c.*—By s. 3, It shall be the duty of all Justices to suppress all tumults, riots, affrays, or breaches of the peace,—all public nuisances, vagrancies, and offences against the law; and to uphold all regulations established by competent authority for the management, &c., of convicts.

Regulation of Police].—See "Constable," *ante*, p. 70, and 16 Vic., No. 83, repealing ss. 4 & 5 of Police Act.

Powers of Police].—Anyone belonging to the Police Force may apprehend any person he shall find drunk in the streets or public places of the said towns, at any hour of the day, and may convey him (or her) before a Justice of the Peace to be dealt with according to law; and may apprehend all loose, idle, drunken, or disorderly persons whom he shall find, between sunset and the hour of eight in the forenoon, lying or loitering in any street, highway, yard, or other place within the said towns, and not giving a satisfactory account of themselves; and may deliver any person so apprehended into the custody of the constable appointed under this Act who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a Justice of the Peace, to be dealt with according to law, or to give bail for his appearance before a Justice of the Peace, if the constable shall deem it prudent to take bail in the manner hereinafter mentioned. (S. 6).

Constables attending at the watch-house in the night may take bail by recognizance from persons brought before them for petty misdemeanors].—S. 7. Where any person found lying or loitering about as aforesaid, or charged with any petty misdemeanor, shall be brought, without a Justice's warrant, into the custody of any constable appointed under this Act during his attendance in the night-time at any watch-house within any of the said towns, it shall be lawful for such constable, if he shall deem it prudent, to take bail by recognizance, with or without sureties as the said constable shall think fit, without fee or reward from such person: conditioned that such person shall appear for examination before a Justice at some place to be specified in the recognizance, at the hour of ten in the forenoon next after such recognizance shall be taken, unless the hour fall on a Sunday, Christmas Day, or Good Friday, and in that case at the like hour on the succeeding day; and every recognizance so taken shall be of equal obligation on the parties

land, Bathurst, and all other towns to which, by Proclamation, it has been extended. (S. 64).

S. 2 Vic., No. 2, s. 8. [*One Justice*].—(1) Any person assaulting or resisting any person belonging to the Police Force of any of the said towns in the execution of his duty under this Act, or aiding or inciting any person so to assault or resist.

P. Fine not exc. £5: to be paid forthwith, or within a time to be ordered by the Convicting Justice; in default of payment, distress; on failure of distress, impr. not exc. 7 days, where the *fine and costs* do not exc. 10s.; 14 days, where they do not exc. £1; 1 cal. m., where they do not exc. £5; 2 cal. m., where they do not exc. £10; and 3 cal. m., where they are of any greater amount,—unless the fine and costs are sooner paid; or if it appear, at time of conviction, that there are not sufficient goods whereupon the said *finer* may be levied, there shall be no sale, but impr. for such time and in such manner as above. (S. 60).

S. *Id.*, s. 9. [*One Justice*].—(2) Any victualler or licensed publican, or other person, knowingly harbouring or entertaining any man belonging to the Police Force, or permitting such man to abide or remain in his house, shop, room, or other place, during any part of the time appointed for his being on duty elsewhere.

P. Fine not exc. £5: to be recovered as offence (1).

S. *Id.*, s. 10. [*One Justice*].—(3) Any person trading or dealing, or keeping open any shop, store, or other place, (except as in Note (N)), for the purpose of trade or dealing on the Lord's Day.

P. Fine £3—£1: recoverable as offence (1).

S. *Id.*, s. 11. [*One Justice*].—(4) The owner or occupier of any public billiard-room, or other place of amusement, permitting or suffering anyone to play in his house or premises any game on Sunday.

P. Fine £5—£3: recoverable as offence (1). (o)

entering into the same, and liable to the same proceedings for the estreating thereof, as if the same had been taken before a Justice; and the constable shall enter into a book to be kept for that purpose in every watch-house, the name, residence, and occupation of the party, and his surety or sureties, (if any), entering into such recognizance, together with the condition thereof, and the sums respectively acknowledged, and shall lay the same before such Justice as shall be present at the time and place when and where the party is required to appear; and if the party does not appear at the time and place required, or within one hour after, the Justice shall cause a record of such recognizance to be drawn up and signed by the constable, and shall return the same to the next General Quarter Sessions, with a certificate at the back thereof, signed by such Justice, that the party has not complied with the obligation therein contained; and the Clerk of the Peace shall make the like estreats and schedules of every such recognizance, as of recognizances forfeited in the Sessions of the Peace; and if the party not appearing shall apply, by any person on his behalf, to postpone the hearing of the charge against him, and the Justice shall consent thereto, the Justice shall be at liberty to enlarge the recognizance to such further time as he shall appoint; and when the matter shall be heard and determined either by the dismissal of the case, or by binding the party over to answer the matter thereof at the Sessions, or otherwise, the recognizance for the appearance of the party before a Justice shall be discharged without fee or reward.

(N) Except the houses or shops of butchers, bakers, fishmongers, and greengrocers, until ten in the forenoon; and of bakers, between the hours of one and two in the afternoon; and of apothecaries, at any hour.

(o) Any Justice appointed under this Act may and is hereby required to dis-

S. Id., s. 12. [One Justice].—(5) Any person damaging any public building, wall, parapet, sluice, bridge, road, street, sewer, watercourse, or other public property.

P. Costs of repairing the same.

S. Id., s. 12. [One Justice].—(6) The same offence, being wilfully done.

P. Fine £20—£5 : recoverable as offence (1).

S. Id., s. 13. [One Justice].—(7) Any person casting any filth or rubbish into any watercourse, sewer, or canal, or obstructing or diverting from its channel any public sewer or watercourse.

P. Fine £5—£1,—recoverable as offence (1),—and the costs of removing such filth or obstruction, or of restoring such watercourse or canal to its proper channel.

S. Id., s. 14. [One Justice].—(8) Any person injuring any public fountain, pump, cock, or water-pipe, or any part thereof.

P. The cost of repairing the same.

S. Id., s. 14. [One Justice].—(9) The same, wilfully done.

P. Fine £20—£1 : recoverable as offence (1).

S. Id., s. 14. [One Justice].—(10) Any person having in his possession any private key for the purpose of opening any cock, or in any manner clandestinely or unlawfully appropriating to his use any water from any public fountain or pipe.

P. Fine £20—£5 : recoverable as offence (1).

S. Id., s. 14. [One Justice].—(11) Any person opening or leaving open any cock of any public fountain or pump, so that the water shall or may run to waste.

P. Fine £2—5s. : recoverable as offence (1).

S. Id., s. 14. [One Justice].—(12) Any person washing any clothes at any public fountain or pump.

P. Fine £1—5s. : recoverable as offence (1).

S. Id., s. 15. [One Justice].—(13) Any person or persons in any street or public place, beating or dusting any carpet, or flying any kite, or driving any carriage for the purpose of breaking, exercising, or trying horses,—or riding any horse, mare, or gelding, for the purpose of airing, exercising, trying, showing, or exposing such horse, mare, or gelding for sale, (otherwise than by passing through such streets or public places);—or throwing, casting, or laying,—or causing, permitting, or suffering to be thrown, cast or laid, or to remain, any ashes, rubbish, offal, dung, soil, dead animal, blood, or other filth or annoyance, or any matter or thing, in or upon the carriage-way or footway of any such street or other public place;—or killing, slaughtering, dressing, scalding, or cutting up any beast, swine, calf, sheep, lamb, or other cattle, in or so near to any of the said streets or other public places as that any blood or filth shall run or flow upon or over, or be on, any or either of any such carriage or footways;—or running, rolling,

perse, or cause to be dispersed, all persons gathering together on Sunday in any public or open place for the purpose of gambling or playing at any game; and to take and seize, or cause to be taken and seized, any implements, instruments, or animals used, or intended to be used, therein, and to destroy or carry away the same; and all persons actually gambling or playing as aforesaid shall be prosecuted according to law.

driving, drawing, placing,—or causing, permitting, or suffering to be run, rolled, driven, drawn, or placed upon any of the said footways of any street or public place, any waggon, cart, dray, sledge, or other carriage, or any wheel, wheelbarrow, handbarrow, or truck, or any hogshead, cask, or barrel;—or wilfully leading, driving, or riding any horse, ass, mule, or other beast upon any of the footways aforesaid.

P. Fine £2—5s. : to be recovered as offence (1).

S. Id., s. 16. [One Justice].—(14) Any person setting or placing, or causing or permitting to be set or placed, any stall-board, chopping-block, show-board, (on hinges or otherwise), basket, wares, merchandise, casks, or goods of any kind whatsoever;—or hooping, placing, washing, or cleansing, or causing to be hooped, placed, washed, or cleansed, any pipe, barrel, cask, or vessel, in or upon or over any of the carriage or foot-ways in any streets or public places;—or setting out, laying, or placing, or causing or procuring, permitting, or suffering to be set out, laid, or placed, any coach, cart, wain, waggon, dray, wheelbarrow, handbarrow, sledge, truck, or other carriage, upon any of the said carriage-ways, except for the necessary time of loading or unloading any cart, wain, waggon, dray, sledge, truck, or other carriage;—or taking up or setting down any fare, or waiting for passengers when actually hired, or harnessing or unharnessing the horses or other animals from any coach, cart, wain, waggon, dray, sledge, truck, or other carriage;—or any person setting or placing, or causing to be set or placed, in or upon or over any of the said carriage or foot-ways, any timber, stones, bricks, lime, or other materials or things for building whatsoever, (unless the same shall be enclosed, as hereinafter is directed), or any other matters or things whatsoever;—or hanging out or exposing, or causing or permitting to be hung out or exposed, any meat or offal, or other thing or matter whatsoever, from any house or other buildings or premises over any part of either or any of such foot-ways or carriage-ways, or over any area or areas of any houses or other buildings or premises, or any other matter or thing from and on the outside of the front or any other part of any house or houses, or other buildings or premises, over or next unto any such street or public place, and not immediately removing all or any such matters or things, being thereto required by any Justice of the Peace or by any police constable appointed under this Act, and not continuing and keeping the same so removed; or any person having,—in pursuance of any such requisition as aforesaid, removed or caused to be removed any such stall-board, show-board, chopping-block, basket, wares, merchandise, casks, goods, coach, cart, wain, waggon, dray, wheelbarrow, handbarrow, sledge, truck, carriage, timber, stones, bricks, lime, meat, offal, or other matters or things, and at any time thereafter again setting, laying, or placing, exposing, or putting out, or causing, procuring, permitting, or suffering to be set, laid, placed, exposed, or put out, the same, or any of them, or any other stall-board, show-board, chopping-block, basket, wares, merchandise, goods, timber, stones, bricks, lime, coach, cart, wain, waggon, dray, truck, wheelbarrow, handbarrow, sledge, meat, offal, or other things or matters whatsoever, (save and except as aforesaid), in, upon, or over any of the carriage or foot-ways of or next unto any streets or public places as aforesaid.

P. Fine £2—5s.: recoverable as offence (1). (P) (Q)

S. *Id.*, s. 19. [*One Justice*].—(15) Any person discharging any fire-

(P) By s. 16, It shall be lawful for any Justice or Police Constable appointed under this Act, without any warrant or other authority than this Act, to seize any such stall-board, show-board, chopping-block, basket, wares, merchandise, cask, goods, coach, cart, wain, waggon, dray, wheelbarrow, handbarrow, sledge, truck, or other carriage, together with the horses, asses, mules, or other animals, if any shall be thereunto belonging, with the harness, gear, and accoutrements thereof, or any such timber or other materials or other matters or things aforesaid, or any of them; and, in case any of the goods, wares, or merchandise so seized shall be perishable or shall be articles of food, then the same shall be immediately forfeited, and the person who shall seize the same shall deliver the same, or cause the same to be delivered, to the Storekeeper of the Benevolent Society for the time being, and where no Benevolent Society is established, such articles may be disposed of towards any charitable purpose; but, otherwise, such Justice or police constable as aforesaid shall cause the aforesaid articles or animals, materials, or other things so seized, and not being of a perishable nature, to be removed to any place appointed for the reception thereof, or otherwise to such place as he or they shall judge convenient, giving parole or written notice of such place wherunto the same shall be removed, unto the owner, driver, or other person having interest in the things so seized and removed, if he shall be then and there present; and the same shall be there kept and detained until such person interested therein, as aforesaid, shall cause to be paid the penalty in which he shall be convicted, together with the charges for taking and removing the same, and of keeping such animal, if any; and, in case the goods, carriages, horses, animals, materials, or other things so removed, (not being perishable or articles of food), shall not be claimed, and the said penalty and charges be paid, within five days next after such removal thereof, then and in every such case it shall be lawful for the said Justice to order the same to be appraised and sold, and the overplus of the money arising from such sale shall be paid to the owners thereof, after deducting the said penalty, and such costs, charges, and expenses attending such seizing, removing, keeping, appraising, and selling the same, as said Justice shall ascertain and allow.

(Q) *Nuisances or Annoyances, Causing.—Exceptions*.—By s. 17, In all cases where by this Act it may be directed, required, and provided that any person setting or placing any stall-board, chopping-block, basket, merchandise, wares, pipes, barrel, cask, or vessel, goods, timber, stone, bricks, lime, or any other materials, matters, or things,—or causing or procuring the same, or any of them, to be placed or set upon any of the carriage or foot-ways, or otherwise, contrary to the regulations herein contained, in any streets or public places within any of the said towns;—or that any person or persons setting or placing any coach, cart, waggon, dray, wheelbarrow, handbarrow, sledge, truck, or other carriage in or upon or over any of the carriage or foot-ways in any street or public place within any of the said towns,—or procuring or causing the same to be so set or placed, shall have notice and be required to remove the same previous to such person being subject or liable to the penalty imposed by virtue of this Act, and to the seizure, forfeiture, appropriation, appraisement, or sale of any such goods, materials, matters, or other things, coaches, carts, waggons, drays, wheelbarrows, handbarrows, sledges, trucks, or other carriages, in manner directed by this Act, then, if any person or persons shall set or place any goods, materials, matters, or other things, or shall set, place, or drive any coaches, carts, waggons, drays, wheelbarrows, handbarrows, sledges, trucks, or other carriages upon or over the said carriage or foot-ways, or any of them, or any part of them, at any time subsequent to his having received such notice;—or having been required to remove the same, or any other goods, materials, matters, or things, or any other coaches, carts, waggons, drays, wheelbarrows, handbarrows, sledges, trucks, or other carriages from off the said carriage or foot-ways, or any of them, shall cause or permit the same, or any of them, to be placed or set by his servants, or by any person employed by him:—in any and every such case it shall not be necessary or requisite that any Justice or police constable as aforesaid, seeing such offence committed again, shall require

arms without lawful cause, or letting off any fire-works in any street or public place.

P. Fine £5—10s. : recoverable as offence (1).

S. Id., s. 20. [One Justice].—(16) Any person burning any shavings or other matters or things in any street or public place.

P. Fine £2—5s. : recoverable as offence (1).

S. Id., s. 21. [One Justice].—(17) Any person bathing near to or within view of any public wharf, quay, bridge, street, road, or other place of public resort, between the hours of six o'clock in the morning and eight in the evening. See "Indecency," "Vagrant."

P. Fine not exc. £1 : recoverable as offence (1).

N.B.—Any constable may arrest without warrant any person found bathing against the provisions of this section. (S. 21).

S. Id., s. 22. [One Justice].—(18) Any individual offending against decency, by the exposure of his or her person in any street or public place, or in the view thereof. See "Indecency," "Vagrant."

P. Fine £10—£5 : recoverable as offence (1).

N.B.—Constable or other person may arrest any person found in the act of committing this offence.

S. Id., s. 23. [One Justice].—(19) Any person whosoever breeding, feeding, or keeping any kind of swine in any house, building, yard, garden, or other hereditaments, situate and being in or within forty yards of any street or public place; or suffering any kind of swine, or any horse, ass, mule, sheep, goat, or other cattle belonging to him, or under his charge, to stray or go about, or to be tethered or depastured in any street or public place.

P. Fine £2—5s. : to be recovered as offence (1).

S. Id., s. 24. [Two Justices].—(20) Every owner or occupier of premises wherein any nuisance shall exist, neglecting to remedy or remove such nuisance, pursuant to notice, (R) and to the satisfaction of the Justices.

the removal of such goods, materials, matters, or other things, or coaches, carts, waggons, drays, wheelbarrows, handbarrows, sledges, trucks, or other carriages; but the same, or any of them, being so set or placed in, upon, or over the said carriage or foot-ways, or any part of them, contrary to the directions of this Act, shall and may be seized, forfeited, removed, applied, detained, appraised, or sold in manner herein provided as to any other goods, materials, matters, or things; and the person so committing the said offence, and the owner of the goods, materials, matters, or things, or coaches, carts, waggons, drays, wheelbarrows, handbarrows, sledges, trucks, or other carriages, which shall be so placed or driven, and the master or employer of the person so offending, shall be subject and liable to the same penalty, forfeitures, proceedings, charges, and punishments as if such person so offending had neglected or refused to remove the said goods, materials, matters, or other things, or coaches, carts, waggons, drays, wheelbarrows, handbarrows, sledges, trucks, or other carriages, when required to do so under and by virtue of this Act, and although the said notices or requisitions shall not have been again given or repeated to the person committing or directing or permitting such offences, or any of them; anything in this Act to the contrary thereof in anywise notwithstanding: Provided that nothing in this Act shall prevent any person from placing an awning in front of any shop or house, so that it be at least seven feet above the foot-way, and the posts be placed close to the curb-stone or outer edge of the foot-way. (S. 18).

(R) By this section, (24), in case any privy, hog-stye, or any other matter or thing which shall be at any time in any place within any of the said towns, shall

P. Fine £10: to be recovered as offence (1).

S. Id., s. 25. [One Justice].—(21) Any owner or occupier of any house or place, neglecting to keep clean all private avenues, passages, yards, and ways within the said premises, so as by such neglect to cause a nuisance by offensive smell or otherwise.

P. Fine £2—10s.: to be recovered as offence (1).

S. Id., s. 26. [One Justice].—(22) Any butcher, or the owner or occupier of any shamble or slaughter-house, obstructing or molesting any Justice or constable authorized by writing in the inspection thereof, or refusing or neglecting to comply with their directions (s) within a reasonable time.

P. Fine £2—10s.: to be recovered as offence (1).

S. Id., s. 27. [One Justice].—(23) Any person hauling or drawing, or causing to be hauled or drawn, on any part of the streets or public places, any timber, stone, or other thing otherwise than upon wheeled carriages;—or suffering any timber, stone, or other thing which shall be carried principally or in part upon wheeled carriages, to drag or trail upon any part of such street or public place to the injury thereof, or to hang over any part of such carriage so as to occupy or obstruct the street beyond the breadth of the said carriage.

P. Fine £2,—to be recovered as offence (1),—over and above the damages occasioned thereby.

N.B.—*Any constable may apprehend any person he shall find in the act of committing any such offence.*

S. Id., s. 28. [One Justice].—(24) The owner or occupier of any house, building, or premises, having any iron or wooden rails or bars over the areas or openings to any kitchens or cellars or other part of the said house, building, or premises, beneath the surface of the footway of any streets or public places, or having any doorway or entrance into the basement or cellar story thereof, and not keeping the same or the rails of such kitchens or cellars in sufficient and good repair, or not safely and securely guarding and constantly keeping the same securely guarded by a

be or become a nuisance to any of the inhabitants thereof, then it shall be lawful for any two Justices, upon complaint thereof made to them by any such inhabitants, and after due investigation of such complaint, by notice in writing, to order that any or every such privy, hog-stye, or other matter or thing, being a nuisance, shall be remedied and removed within seven days after such notice shall have been given to the owner or occupier of the premises wherein such nuisance shall exist, or shall have been left for such owner or occupier at his or her last or usual place of abode, or on the said premises; and it shall also be lawful for such Justices to indict for such nuisance such person neglecting or disobeying such notice, at the next Quarter Sessions to be held within any of the said towns, and, if convicted, such nuisance shall be removed, taken down, and abated, according to law with regard to public or common nuisances; and the offender shall be subject to such punishment as the Justices assembled at Quarter Sessions within any of the said towns shall direct. (S. 24).

(s) For preserving cleanliness and health, it shall be lawful for any Justice appointed under this Act, and for any constable authorized by any writing under the hand of any such Justice, whenever and as often as either of them shall see occasion, to inspect the butchers' shambles and slaughter-houses in any of the said towns for which he or either of them shall be so respectively appointed, and to give such directions concerning the cleansing the said shambles, &c., both within and without, as to him shall seem needful. (S. 26).

rail or rails, or covering the same over with a strong flap or trap-door, according to the nature of the case, and so as to prevent danger to any persons passing and re-passing;—or any such owner or occupier leaving open or not sufficiently and substantially covering and keeping covered and secured any coal-hole, or other hole, funnel, trap-door, or cellar-flap belonging to or connected with his or her house, building, or premises, (save and except only during such reasonable times as any coals, wood, casks, or other things shall be putting down or taking up out of any such vault or basement story, or during such reasonable times as the flap, trap-door, or covering thereof shall be altering, repairing, or amending);—or such owner or occupier not repairing, and from time to time keeping in good and substantial repair, to the satisfaction of the Justice appointed under this Act, all and every or any such iron or wooden rails, guard-rails, flaps, trap-doors, and other covering.

P. Fine £5—£2: recoverable as offence (1).

S. *Id.*, s. 29. [*One Justice*].—(25) Any person making any cellar or any opening, door, or window in or beneath the surface of the footway of any street or public place.

P. Fine £5,—recoverable as offence (1),—over and above the expense of remedying or removing any such cellar, &c., made contrary to the provisions hereof,—such expense to be assessed and allowed by such Justice.

S. *Id.*, s. 30. [*One Justice*].—(26) Any person having any such well as hereby mentioned, (s. 30), and failing to cover and secure the same in the manner and within the time hereby required and directed. (T)

P. Fine 2s. 6d. for every day that such well shall remain open and uncovered contrary to the provisions of this Act: to be recovered as offence (1).

S. *Id.*, s. 31. [*One Justice*].—(27) Any person or persons digging or making, or causing to be dug or made, any hole, or leaving or causing to be left any hole before any vacant ground, or before or behind or on the side of any house or other tenement or building erected, or being erected, or about to be erected in and adjoining to any street or public place formed, or to be formed, or forming, for the purpose of making any vault, or the foundation to such houses or other buildings, or for any other purpose whatever, and not forthwith enclosing the same in a good and sufficient manner to the satisfaction of the Police (v) Magistrate of the said town respectively;—or keeping up, or causing to be kept up and continued, any such enclosure for any time longer than absolutely necessary in

(T) Every person who shall have a well situate between his or her dwelling-house, or the appurtenances thereof, and any street or footway within the limits of any of the said towns, or at the side thereof, or in any yard or place open or exposed to such street or footway, shall cause such well to be securely and permanently covered over, and shall not be at liberty to open the same or draw water therefrom unless by a pump fixed closely and securely therein. (S. 30).

(v) 2 Vic., No. 2, is repealed as to regulation of Police, by 14 Vic., No. 38. 11 Vic., No. 44, enacts, That every Justice of the Peace shall have the same power and authority within the limits of any of the said country towns near to his residence as he would have if he had been duly appointed to execute duties of Police Magistrate within such town: Provided that this does not apply to any such town in which there may be now or hereafter a duly appointed Police Magistrate in the performance of the duties imposed by 2 Vic., No. 2.

the opinion of the said Magistrate, or (when thereunto required by the said Magistrate) neglecting well and sufficiently to fence or enclose any such hole, or area, or space opened or left open, and intended for an area, foundation, or any other purpose whatsoever, in front of, or behind, or on the side of any such vacant ground, house, or other tenement or building in and adjoining to any such street or public place formed, or forming, or to be formed, within twenty-four hours after he or they shall be required to do so by the said Magistrate, and in the manner and with such materials as he shall direct, and to his satisfaction; and not placing a light upon the said enclosure, and keeping the same constantly burning, from sunset to sunrise, during the continuance of such enclosure.

P. Fine £5—£2 : to be recovered as offence (1).

S. *Id.*, s. 32. [*One Justice*].—(28) The owner or occupier of any house or building neglecting to provide such house, &c., with gutters, or to be otherwise so constructed as to prevent rain from dropping from the eaves thereof upon any part of the footway of any street or public place within any of the said towns.

P. Fine 5s. for every day that the same be not prevented or remedied, by gutters or otherwise : to be recovered as offence (1).

S. *Id.*, s. 33. [*One Justice*].—(29) Any person or persons driving, or causing to be driven, any cart or other carriage with any night soil or ammoniacal liquor therein through or in any of the streets or public places, between the hours of five o'clock in the morning and ten o'clock at night, or filling any cart or other carriage so as to turn over or cast any night soil, ammoniacal liquor, slop, mire, or channel dirt, or filth in or upon any of the said streets or other public places.

P. Fine £5 : to be recovered as offence (1)

N.B.—*Any person may apprehend the offender without other warrant than the authority of this Act, and convey him before a Justice. Provided the offender cannot be apprehended, the owner of such cart or carriage in which such night-soil, &c., shall be put or placed, and also the employer of the offender, shall be liable to and forfeit and pay such penalty as aforesaid.*

S. *Id.*, s. 34. [*One Justice*].—(30) Any person emptying or beginning to empty any privy, or taking away night-soil from any house or premises, within the streets or public places, or coming with carts or carriages for that purpose, except between the hours of ten at night and five in the morning;—or putting in or casting out of any cart or tub or otherwise, any night-soil in or near any of the streets or public places.

P. Impr. not exc. 30 days : to be computed from day of commitment.

N.B.—*It shall be lawful for any constable, (and he is hereby strictly charged so to do), or for any other person whoever, without any warrant or other authority than this Act, to apprehend and convey any person or persons found committing any of the said offences, or either of them, to any watch-house, or any other place of confinement or security, and thence to convey him or them, as soon as conveniently may be, before some Justice. The owner of any carts, carriages, horses, or beasts employed in and about emptying and removing such night-soil, or coming for that purpose, (save and except within the hours hereby allowed), or the employer of any person who shall so put or cast out any such night-soil, shall forfeit and pay the sum of £5 for every such offence.*

S. Id., s. 35. [*One Justice*].—(31) Any person wantonly or maliciously breaking or injuring any lamp or lamp-post, or extinguishing any lamp set up for public convenience.

P. Fine £5—£1, —to be recovered as offence (1), —over and above expense of repairing injury committed, to be estimated by the Justice.

N.B.—*Any constable may seize any person found committing any such offence, and convey to nearest watch-house.*

S. Id., s. 36. [*One Justice*].—(32) Any person throwing or causing to be thrown any dead animal into any street, lane, road, or other public place within the limits of any of the said towns, or into any river, creek, or other stream flowing through, by, or along any such street, lane, road, or other public place within the same; or leaving, or causing to be left, the same upon the shores thereof.

P. Fine £1—5s. : to be recovered as offence (1).

N.B.—*Constable may arrest as under s. 35, or take before Justice.*

S. Id., s. 37. [*One Justice*].—(33) Any person blasting, or causing to be blasted, any rock within the limits of any of the said towns, without giving notice, in writing, twenty-four hours previously, to the (Note v) Police Magistrate, (who shall appoint a time, &c.), or not conforming to such directions given to him by the said Magistrate as he may deem necessary for the public safety.

P. Fine £20—£10 : to be recovered as offence (1)

N.B.—*The Police Magistrate shall appoint a time when the blasting may take place, and give such other directions as he may deem necessary for the public safety.*

S. Id., s. 38. [*One Justice*].—(34) Any person forming, digging, or opening any drain or sewer, or removing, or causing to be removed, any turf, clay, sand, soil, gravel, stone, or other material used in the formation of the streets, in and from any part of the carriage or foot-ways, without leave first had and obtained from the Police Magistrates; or wantonly breaking up or otherwise damaging the said carriage or foot-ways.

P. Fine £5—£1 : to be recovered as offence (1).

S. Id., s. 39. [*One Justice*].—(35) The driver of any waggon, wain, cart, or dray of any kind, riding upon any such carriage in any street or public place, and not having any person on foot to guide the same, (light carts drawn by one horse and guided with reins only excepted); —or the driver of any carriage wilfully being at such a distance therefrom, or in such a situation whilst it is passing on such street or public place that he cannot govern the horses or cattle drawing the same; —or any person riding on the shaft of any waggon, &c.; —or the driver of any waggon, &c., or other carriage, meeting any other carriage, and not keeping his waggon, &c., on the left or near side of the road; —or any person in any manner wilfully preventing any other person from passing him, or any carriage under his care, upon such street or public place; —or, by negligence or misbehaviour, preventing, hindering, or interrupting the free passage of any carriage or person in or upon the same.

P. Fine £2—10s. : to be recovered as offence (1).

N.B.—*Any constable or other person may apprehend any person so offending, &c., and convey before Justice.*

S. Id., s. 40. [*One Justice*].—(36) Any person riding or driving

through any street or public place within any of the said towns, so negligently, carelessly, or furiously, that the safety of any other person shall be actually endangered. See "Carriages," p. 56.

P. Fine £10—£2: to be recovered as offence (1).

S. *Id.*, s. 41. [*One Justice*].—(37) Any person posting or otherwise affixing any placard or other paper upon any wall, house, or building, or defacing any such wall, &c., by chalk or paint, or otherwise.

P. Fine 10s.: to be recovered as above, (*upon the complaint of the owner or occupier of any such wall, &c.*)

N.B.—By 2 Vic., No. 3, amending 4 W. IV., No. 7, the penalty for the like offence in 'the Town and Port of Sydney,' is any sum not exc. £1.

S. *Id.*, s. 43. [*One Justice*].—(38) Any person pulling down, destroying, defacing, or injuring any marks, marking the limits of the said towns. (w)

P. (*1st offence*), fine £5; (*2nd offence*), fine £10; (*3rd and subsequent offence*), fine £20: to be recovered as offence (1).

S. *Id.*, s. 44. [*One Justice*].—(39) Any person wilfully obstructing or hindering the Police Magistrate (Note v) of each town, or any of his assistants, in perambulating the limits of said town.

P. Fine £5: to be recovered as offence (1).

N.B.—*The Police Magistrate of each town shall perambulate, with proper assistants, the said limits on some convenient day in Easter week in each and every year, and shall make a record thereof, to be filed and kept in the office of the Clerk of the Peace for each town.*

S. *Id.*, s. 48. (x) [*One Justice*].—(40) Any person erecting or rebuilding

(w) The Surveyor-General and his Deputy shall set out and mark with sufficient marks the limits of the said towns, subject to the Governor's approval; and upon publication of description of the boundaries in the *Government Gazette*, the same shall be deemed to be the limits of the said towns respectively; and neither the Surveyor-General nor his assistants nor deputies shall be deemed to commit any trespass by entering on private property to erect, uphold, or repair the said marks. (S. 43).

(x) Ss. 45, 46,—by which the Surveyor-General or his Deputy shall set out the breadth of the carriage and foot-ways of all towns within the operation of this Act, and cause the foot-ways to be marked by posts wherever necessary; and also, before the said Surveyor-General or his Deputy shall set out such foot-ways, he shall lay before the Governor and Executive Council a plan of the same, and thereupon the said Governor and Executive Council shall fix and declare the distances from the exterior edge of such foot-ways within which buildings may not be erected,—are amended by 19 Vic., No. 10, which enacts, that in all towns in which streets shall have been set out and allotments sold in conformity with the design of such towns, it shall be sufficient for the Surveyor-General or his Deputy, or any Magistrate or Municipal Officer of such town, under the authority of the Governor, to set out and mark the carriage and foot-ways, by placing posts at the corners and intersections of the streets, or wherever necessary or desirable, so as to give a width of 42 feet for the carriage-way, and 12 feet for each foot-way, in streets 66 feet wide, and in proportion in streets, lanes, &c., of other widths than 66 feet; and thereupon such carriage and foot-ways respectively shall be deemed to be fully set out and marked for the purposes of the Act.

By s. 47, The curb-stone of the foot-ways shall not be on private property, unless with proprietor's consent, or by 4 W. IV., No. 11; and all land now open to the street, or formed into a street at the public expense, is to be deemed dedicated to the public. Land heretofore used as a carriage or foot-way may be resumed, with the consent of the Governor.

any house, shop, or other building, in whole or in any part, or making any addition or alteration to the same, except according to the provisions hereof. (Y)

P. Fine £20: to be recovered as offence (1).

S. Id., s. 49. [One Justice].—(41) Any person beginning to erect any house, shop, or other building in any street within any of the said towns without first serving notice in writing on the Police Magistrate on any lawful day, between the hours of eleven and three o'clock, stating such intention, and describing the proposed situation of the building, and without having received a paper signed by the said Police Magistrate, specifying the provisions of this Act, so far as the same may relate to the erection of such house, &c.

P. Fine not exc. £10: to be recovered as offence (1).

S. Id., s. 49. [One Justice].—(42) The said Police Magistrate refusing or neglecting to furnish such written paper within seven days after receipt of such notice.

P. Fine £10, (unless reasonable cause be shown): to be recovered as offence (1).

S. Id., s. 50. [One Justice].—(43) Any owner or occupier of any house, building, or premises, having any entrance, area, garden, or other open space adjoining the footway of any street or public place beneath the level of the curb-stone or exterior edge of such foot-way, or having any steps adjoining such foot-way, and failing to protect and guard the same by good and sufficient rails, fences, or other enclosures, so as to prevent danger to persons passing and re-passing.

P. Fine £5—£2, (as often as convicted): to be recovered as offence (1).

S. Id., s. 52. [One Justice].—(44) The occupier of any house in any street or public place, refusing or neglecting to paint or affix, or cause to be painted or affixed, in legible characters, upon the door of such house, the number allotted thereto, within fourteen days after written notice to that effect from the person appointed by the Governor left at said house.

P. Fine 10s., and the like sum for every week during the continuance of such refusal or neglect: to be recovered as offence (1).

S. Id., s. 54. [One Justice].—(45) Any person, after the said foot-ways shall be so set out as aforesaid (see s. 53) in any of the said towns, desirous of flagging, paving, gravelling, or putting a curb-stone to the foot-way in front of his or her house, and commencing any such work with-

By s. 53. Any person appointed by the Governor may cause the foot-ways to be levelled, &c., and may remove any flagging, steps, or other obstructions, if necessary, which may be erected or placed on the said foot-ways.

(Y) As soon as the foot-way of any street or public place within any of the said towns shall be fixed and declared by the Governor and Executive Council, (see Act, and 19 Vic., No. 10), no house, &c., shall be erected, or rebuilt, or allowed to project, within the fixed distance from outer edge of said foot-way, nor any addition or alteration be made to the same, except in conformity with the provisions hereof; and if said house, &c., be not removed and abated within one month after notice from the Police Magistrate, the owner or occupier thereof shall further forfeit £1 for every day the same shall remain contrary to this Act; and two or more Justices (the said Police Magistrate being one) may grant a warrant to cause the said house, &c., to be taken down, and the materials to be sold; the surplus, after paying the charges of taking down the same, to be paid to the owner thereof. (S. 48).

out giving notice in writing of such intention, at least twenty-four hours before such work shall have been begun, to the Police Magistrate, at his office, between the hours of eleven a.m. and three p.m. on any lawful day, or refusing or neglecting to conform to the directions of the said Magistrate as to the length, breadth, height, slope, and inclination of such foot-way.

P. Fine £10—£5: to be recovered as offence (1).

N.B.—*Any two or more Justices (the said Police Magistrate (Note v) being one) may order the removal of all work which may be so executed contrary to such directions.*

S. *Id.*, s. 55. [*One Justice*].—(46) Any person, in any manner whatsoever, wilfully obstructing, hindering, or molesting any person having the control of the streets or public places within any of the said towns, or any surveyor or other officer, or person whomsoever, appointed, employed, or authorized to put in execution this Act, in the performance or execution of their duty.

P. Fine (1st offence), £5; (2nd offence), £10; (3rd and subsequent offence), £20: to be recovered as offence (1).

S. *Id.*, s. 59. (z) [*One Justice*].—(47) Any person, being summoned to attend as a witness to give evidence, on oath or solemn affirmation, before any Justice or Justices, touching any matter of fact contained in any information or complaint for any offence against this Act, whether on the part of the prosecutors or informers, or of the persons complained of, being within the limits of any of the said towns in which the cause of such complaint shall have arisen, and refusing or neglecting to appear at such time and place to be for that purpose appointed, without such excuse for such refusal or neglect as shall be approved of by such Justice, &c.; or, appearing and refusing to be examined on oath or solemn affirmation, or to give evidence, before such Justice, &c.

P. Fine £10—£5: to be recovered as offence (1).

N.B.—*The Justice is required to issue the summons if demanded.*

S. 19 Vic., No. 24, s. 1. [*One Justice*].—(48) Any person brought before any Justice of the Peace, charged with having in his possession, or

(z) S. 56 provides for the framing of Market Regulations by the Justices, subject to the approval of the Governor; and s. 57 empowers the Colonial Treasurer to farm the stalls or standings in the Market Houses.

Provisions to be extended to any Town.—When the Governor for the time being shall deem it expedient to extend the provisions of this Act to any other town in the said Colony, it shall and may be lawful for the said Governor, or Acting Governor for the time being, to declare the same by proclamation, to be published in the *Government Gazette*; and from and after the publication thereof, this Act shall be deemed and taken to apply and be in force in the towns to be specified in such proclamation, to all intents and purposes as fully and effectually as if the said towns were specially named therein. (S. 64).

Jurisdiction.—Limitation of Time.—All complaints may be heard by one Justice; the procedure is by summons. No conviction after the expiration of one month from the time when the offence was committed. (S. 58).

Appeal.—By s. 61. Where the penalty is above five pounds, the defendant may appeal to the next Quarter Sessions for the district where such offence was committed, provided the same be not holden within seven days after such conviction or order, and then to the Quarter Sessions next ensuing;—the appellant to enter into a bond or recognizance in double the penalty incurred.

Appropriation of Fines.—One-half to the informer, and one-half to Her Majesty; unless otherwise specially appropriated; (s. 67); and see 19 Vic., No. 24, s. 7.

conveying in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, and not giving an account to the satisfaction of such Justice how he came by the same.

P. Fine not exc. £10: to be recovered as offence (1); (A) or impr. for not exc. 3 cal. m., with or without h.l.; as to search warrant, &c., see Note (B); as to examination and punishment of party from whom stolen goods are received, see Note (C), and the disposition of such goods, see Note (D)

(A) S. 26 incorporates this Act with 2 Vic., No. 2; and provides that it shall be construed as part and parcel thereof; it is questionable whether the mode of recovering penalties provided by the latter Statute is thus intended to be given; no other mode of recovery is provided. Section 23 (Note L) is insensible on this point.

(B) *In case of information given that there is reasonable cause for suspecting that any Goods have been unlawfully obtained, and are concealed*.—By s. 2, If information shall be given on oath to any Justice of the Peace, that there is reasonable cause for suspecting that anything stolen or unlawfully obtained is concealed or lodged in any dwelling-house or any other place, it shall be lawful for such Justice, by special warrant under his hand, directed to any Chief Constable or Inspector of Police, to cause every such dwelling-house or other place to be entered and searched at any time of the day, or by night, if power for that purpose be given by such warrant; and the said Justice, if it shall appear to him necessary, may empower such Chief Constable or Inspector, with such assistance as may be found necessary,—such Chief Constable or Inspector having previously made known such his authority,—to use force for the effecting of such entry, whether by breaking open doors or otherwise; and if, upon search thereupon made, any such thing shall be found, then to convey the same before a Justice of the Peace, or to guard the same on the spot until the offenders are taken before a Justice of the Peace, or otherwise dispose thereof in some place of safety; and moreover to take into custody and carry before the said Justice every person found in such house or place who shall appear to be privy to the deposit of any such thing, knowing, or having reasonable cause to suspect, the same to have been stolen or otherwise unlawfully obtained.

(C) *Party from whom stolen Goods are received to be examined by the Justice*.—By s. 3, When any person shall be brought before any such Justice of the Peace, charged with having or conveying anything stolen or unlawfully obtained, and shall declare that he received the same from some other person, or that he was employed as a carrier, agent, or servant, to convey the same for some other person, such Justice is hereby authorized and required to cause every such person, and also, if necessary, every former or pretended purchaser, or other person through whose possession the same shall have passed, to be brought before him and examined, and to examine witnesses upon oath touching the same; and if it shall appear to such Justice that any person shall have had possession of such thing, and had reasonable cause to believe the same to have been stolen or unlawfully obtained, every such person shall be deemed guilty of a misdemeanor, and to have had possession of such thing at the time and place when and where the same shall have been found or seized; and the possession of a carrier, agent, or servant shall be deemed to be the possession of the person who shall have employed such other person to convey the same, and shall be liable to a penalty of not exc. £10; or, in the discretion of the Justice, imprisonment, with or without hard labour, for not exceeding 3 calendar months.

(D) *Power to order delivery of possession of Goods charged to have been stolen or fraudulently obtained, and in custody of Constable*.—By s. 4, If any goods or money charged to be stolen or fraudulently obtained shall be in the custody of any constable, by virtue of any warrant of a Justice, or in prosecution of any charge of felony or misdemeanor in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid shall not be found, or shall have been summarily convicted or discharged, or shall have been tried and acquitted, or, if such person shall have been tried and found guilty, but the pro-

S. Id., s. 6. [One Justice].—(49) Any person lodging any information before any Justice of the Peace for any offence alleged to have been committed, by which he was not personally aggrieved, and afterwards directly or indirectly receiving, without the permission of one of Her Majesty's Justices of the Peace, any sum of money or other reward for compounding, delaying, or withdrawing the information.

P. Fine not exc. £10: to be recovered as offence (48).

N.B.—*The Justice may issue his warrant or summons, as he may deem best, for bringing before him the party charged with such offence.* As to the power of convicting Justice to lessen informer's share, see Note (E).

S. Id., s. 8. [One Justice].—(50) Every person occupying or having occupied any house or lodging as tenant thereof, and wilfully or maliciously doing any damage to the premises, or to any furniture thereof, not being the property of such tenant or occupier.

P. Forfeit such sum as shall appear to the Justice reasonable compensation for the damage done, not more than £20,—to be paid to landlord or party aggrieved: to be recovered as offence (48).

N.B.—*Upon complaint laid within one cal. month next after the commission of the offence, or the end of the tenancy or occupation.* As to summary adjudication in case of excessive or irregular distress, see Note (F);

party so in custody shall not have been included in any indictment upon which he shall have been found guilty,—it shall be lawful for any Justice of the Peace to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof;—or in case the owner cannot be ascertained, then to make such order with respect to such goods or money as to such Justice shall seem meet: Provided that no such order shall be any bar to the right of any person to sue the party to whom such goods or money shall be delivered, and to recover the same from him by action at law, so that such action shall be commenced within six cal. months next after date of such order. And by s. 6,—

Unclaimed stolen Goods in the custody of the Police may be sold after twelve months for the benefit of the Police Reward Fund.—When any goods or money charged to be stolen or unlawfully obtained, and of which the owner shall be unknown, shall be ordered by any Justice of the Peace to be detained, it shall be lawful for any Justice, after the expiration of twelve calendar months during which no owner shall have appeared to claim the same, to sell or dispose of such goods or money for the benefit of the Police Reward Fund. (8. 5).

(E) By s. 7, Where by any Act now in force, or hereafter to be passed, a moiety or other fixed portion of the penalty or penalties thereby imposed is or shall be directed to be paid to the informer, not being a party aggrieved, it shall be lawful for any of Her Majesty's Justices before whom the conviction shall be had, to adjudge that no part, or such part only of the penalty as he shall think fit, shall be paid to the informer.

(F) *Power to deal summarily with cases of oppressive Distress.*—By s. 9, On complaint made to any Justice of the Peace by any person who shall have occupied any house or lodging by the week or month, or whereof the rent does not exceed the rate of twenty-five pounds by the year, that his goods have been taken from him by an unlawful distress, or that the landlord, or his broker or agent, has been guilty of any irregularity or excess in respect of such distress, it shall be lawful for such Justice to summon the party complained against, and if, upon the hearing of the matter, it shall appear to the Justice that such distress was improperly taken or unfairly disposed of,—or that the charges made by the party having distrained, or having attempted to distrain, are contrary to law,—or that the proceeds of the sale of such distress have not been duly accounted for to the owner thereof, the Justice may order the distress so taken, if not sold, to be returned to the tenant, on payment of the rent which shall appear to be due, at such time as the Justice shall appoint;—or, if the distress shall have been sold, then may order

as to the power to order restitution of goods unlawfully detained to the owner, see Note (g).

S. Id., s. 15. (H) [One Justice].—(51) Any person being appointed

payment to the said tenant of the value thereof, deducting thereout the rent which shall so appear to be due, such value to be determined by the Justice; and such landlord or party complained against, in default of compliance with any such order, shall forfeit to the party aggrieved the value of such distress, not being greater than twenty-five pounds,—such value to be determined by the Justices. It thus appears that the jurisdiction given by this section is ousted by payment of rent, even though made under an illegal pressure. See *Collyer v. Shaw*, (Nov. 10, 1856).

(g) *Power to order the delivery of Goods unlawfully detained to the Owner*.—By s. 10, Upon complaint to any Justice by any person claiming to be entitled to the property or possession of any goods which are detained by any other person, the value of which shall not be greater than twenty pounds, and not being deeds, muniments, or papers relating to any property of greater value than fifty pounds, it shall be lawful for any Justice to summon the person complained of, and to inquire into the title thereto, or to the possession thereof; and, if it shall appear to the Justice hearing the case that such goods have been detained without just cause, after due notice of the claim made by the person complaining, or that the person detaining such goods has a lien or right to detain the same by way of security for the payment of money, or the performance of any act, by the owner thereof,—it shall be lawful for such Justice to order the goods to be delivered up to the owner thereof, either absolutely, or upon tender of the amount appearing to be due by such owner, (which amount the Justice is hereby authorized to determine); or upon performance, or upon tender and refusal of the performance, of the act for the performance whereof such goods are detained as security,—or, if such act cannot be performed, then upon tender of amends for non-performance thereof, (the nature or amount of which amends the Justice is hereby authorized to determine); and every person who shall neglect or refuse to deliver up the goods according to such order, shall forfeit to the party aggrieved the full value of such goods, not greater than twenty pounds,—such value to be determined by the Justice: Provided always that no such order shall bar any person from recovering possession of the goods or money so delivered or forfeited, by suit or action at law, from the person to whose possession such goods or money shall come by virtue of such order, so that such action be commenced within six calendar mths. next after such order shall be made.

In *Pender v. Ward*, (Nov. 3, 1857), it was decided that when, under this section, goods are unlawfully detained, the Justices must first simply make an order for "the goods to be delivered up to the owner thereof," &c.; but they cannot in such order give any direction as to costs, or distress upon failure of compliance with such order; and, secondly, that any order adjudging the value can only be made after a further summons has been issued, requiring defendant to show cause why he neglects or refuses to deliver goods already ordered by the Justice to be delivered. The defendant is a competent witness, as it is not a summary conviction.

In *re John Healey*, (Dec. 16th, 1858), it was held that the Justices have no jurisdiction to determine any complaint for any alleged detention of property of greater value than £20 until "after due notice," &c.;—that the taking the goods out of complainant's possession did not satisfy this condition; but that, to constitute such notice, it was necessary that there should be a demand, and notice of that demand, independently of and prior to the notice furnished by the issuing of the summons itself. The Form of summons (in Sch. A.) given by the Act requires the offence to be stated, and therefore the offence must be complete before its issue. Four things are required to give jurisdiction:—1. A detention; 2. Absence of just cause; 3. Demand made by the complainant; 4. Notice of that demand. It was doubted whether part of the claim could be abandoned, and made the subject of a second proceeding; and also whether the Statute at all applies to cases of trespass.

(H) By s. 12, When any tumult, riot, or felony has taken place, or may be reasonably apprehended, in any city, town, or place, and any Police Magistrate or any two Justices shall be of opinion that the ordinary constables or officers ap-

special constable, and refusing to take the oath hereinbefore mentioned, when thereunto required by the said Police Magistrate or Justice so appointing him.

P. Fine not exc. £20 : to be recovered as offence (48).

S. Id., s. 15. (Note H) [*One Justice*].—(52) Any person being appointed special constable, and neglecting or refusing to appear at the time and place for which he shall be summoned for the purpose of taking the said oath, or, having been appointed and sworn as a special constable, and, when called upon to serve, neglecting or refusing to serve as such special constable, or to obey such lawful orders and directions as may be given to him by the Police Magistrate, or any Justice of the Peace, or any Chief Constable or Inspector of Police, or other officer under whose orders he may be placed for the performance of the duties of his office.

P. Fine not exc. £10 : to be recovered as offence (48).

N.B.—*Unless the person convicted shall prove to the Justice's satisfaction that he was prevented by sickness or some other unavoidable cause.*

S. Id., s. 17. [*One Justice*].—(53) Any special constable omitting or refusing, after the expiration of his office, or after he shall cease to hold and exercise the same pursuant to this Act, to deliver over to his successor, (if any such shall have been appointed), or otherwise to such person and at such time and place as may be directed by the Police Magistrate or Justices, all arms, staves, weapons, and other articles which shall have been provided for such special constable under this Act.

P. Fine not exc. £10 : to be recovered as offence (48).

S. Id., s. 18. [*One Justice*].—(54) Any person assaulting or resisting any special constable in the execution of his office,—or promoting, inciting, or encouraging any other person so to do.

pointed for preserving the peace are not sufficient for the preservation of the peace, and for the protection of the inhabitants and the security of the property of the inhabitants thereof, or for the apprehension of any offenders,—he or they may nominate and appoint, by precept in writing under his or their hands, so many as he or they shall think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in or near to such city, town, or place, to act as special constables for such time, &c.; and he or they are hereby authorized to administer to every person so appointed the following oath, viz. :—

"I, A. B., do swear that I will well and truly serve our Sovereign Lady the Queen in the office of special constable for the (*city, town, or place, as the case may be*), without favour or affection, malice or ill-will; and that I will to the best of my power cause the peace to be kept and preserved, and prevent all offences against the persons and properties of Her Majesty's subjects; and that, while I continue to hold the said office, I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully, according to law. So help me God."

Notice thereof shall be forthwith transmitted by the said Police Magistrate or Justices to the Colonial Secretary of the Colony.

By s. 13, The Police Magistrate or Justices may make regulations respecting special constables, and may remove them for misconduct.

By s. 14, Special constables shall possess the same powers and immunities, and have the same duties and responsibilities, as ordinary constables.

By s. 16, The Police Magistrate or Justices may suspend or determine the services of special constables,—notice thereof to be transmitted forthwith to the Colonial Secretary. (*R. v. Porter*, 9 C. & P., 778; *R. v. Best*, 16 L. J. M. C., 162; *Wise on Riots*, 71, cited *Oke*, S., 647).

P. Fine not exc. £10: recoverable as offence (48); or, if convicting Justice think fit, impr. for not exc. 6 mths., with or without h. l.

S. *Id.*, s. 19. [*One Justice*].—(55) Any person assaulting, resisting, or interrupting any Sheriff's Bailiff, Bailiff of the Court of Requests, or any Keeper or other officer, in the discharge of any public duty, or any Bailiff or Keeper distraining for rent or for rates or taxes,—or rescuing or attempting to rescue any property levied or distrained on.

P. Fine not exc. £10: recoverable as offence (48); or, if convicting Justice think fit, impr. for not exc. 6 mths., with or without h. l. (1)

S. *Id.*, s. 20. [*One Justice*].—(56) Any person keeping or having any house, shop, room, or place of public resort, wherein ready-made provisions, liquors, or refreshments of any kind shall be sold or consumed, (whether the same shall be kept or retailed therein, or procured elsewhere), and opening or having open his premises for the reception or entertainment of promiscuous persons, or for the ordinary transaction of business, at an earlier hour than six o'clock in the morning, or later than the hour of twelve o'clock at night.

P. Fine not exc. £5: to be recovered as offence (48). (K).

S. *Id.*, s. 21. (L) [*One Justice*].—(57) Every person in any street, road,

(1) Provided always that, if the Justices hearing the case shall think the same a proper case to be sent to a superior Court to be dealt with, such Justice shall be at liberty to commit such person to take his trial for such offence. (S. 19).

(K) *Assault, Imprisonment*.—By s. 22, In all cases of summary convictions for assault, it shall be in the discretion of the Justices before whom any such conviction shall take place, either to inflict the several fines in the several Acts specifying the offence mentioned, or to imprison the person so convicted for any term not exceeding the maximum terms respectively mentioned in the said Acts. (S. 22).

(L) *Procedure; Appeal*.—By s. 23, All offences committed, and all penalties or forfeitures, which, under this or any other Police Act, or Police Regulation Act, and which are punishable on summary conviction before a Justice or Justices of the Peace, may be heard and determined by any Justice of the Peace in a summary way, within six months next after the commission of such offence, or within such shorter time as shall be limited by the Act specifying the offence, and not afterwards, whether or not any information or complaint in writing shall have been exhibited or taken by or before any such Justices; and all such proceedings by summons, without information or complaint in writing, shall be as valid and effectual as if an information or complaint in writing had been first exhibited or taken in that behalf: Provided always that a Note or Memorandum in writing, according to the Form, or to the effect as set forth in the Schedule to this Act annexed, marked A., shall be made and kept of the substance of every charge for which a summons shall be issued: Provided also, that the Justice, if he shall think fit, may require an information or complaint in writing to be laid in every case to which it shall seem to him expedient, before the matter of the charge or complaint shall be brought before him; and the Justice shall examine into the matter of every charge or complaint brought before him or them; and if, upon the confession of the party accused, or on the oath of any one or more witnesses, the party accused shall be convicted of having committed the offence charged or complained of, the party so convicted shall pay such a penalty as to the Justice shall seem fit, not more than the greatest penalty that may be payable in respect of such offence, together with the costs of conviction, to be ascertained and assessed by such Justice. (S. 23). This section requires some correction.

By s. 24, All warrants upon conviction for being drunk and disorderly, under 13 Vic., No. 29, may be drawn up in the Form in Schedule B. of this Act, and may include any number of persons in the same warrant, with the sentence of each separately, and it shall be lawful to confine any person so convicted in any watch-house during such sentence, instead of sending him to gaol.

square, alley, thoroughfare, or public place or passage, to the obstruction, annoyance, or danger of the residents or passengers, committing any of the subjoined offences :—

P. Fine not exc. £2 for each offence : to be recovered as offence (48).

1. Selling gunpowder, squibs, rockets, or other combustible matter, by gas, candle, or other artificial light.

2. Hoisting or causing to be hoisted, or lowering or causing to be lowered, goods of any description from any opening in front of the house of any main street, or from back streets, without sufficient and proper ropes and tackling.

3. Carrying or conveying, or causing to be carried or conveyed, in any street or public place, the carcass, or any part of the carcass, of any newly slaughtered animal, without a sufficient and proper cloth covering the same, for the concealment from public view ; or hawking or carrying about butcher's meat for sale without covering the same as aforesaid.

4. Placing any line, cord, or pole across any street, lane, or passage, or hanging or placing clothes thereon, to the danger or annoyance of any person.

5. Placing, hanging up, or affixing any sign-post, board, house-ticket, notice, or other similar thing, otherwise than close and parallel to, or flat upon, the wall of the house, shop, or building to which the same belongs.

6. Fixing and placing any flower-pot in any upper windows, without sufficiently guarding the same from being thrown down.

7. Throwing or casting from the roof or any part of any house or other building, any slate, brick, part of a brick, wood, rubbish, or other material or thing, (unless within a board, when any house or building is being erected or repaired).

8. Any blacksmith, whitesmith, anchorsmith, nailmaker, or other person using a forge, and having a door, window, or aperture fronting or opening into or towards any street, lane, or passage, and not closing such door, or not fastening the shutters or other fastenings of such window, and closing such aperture, every evening, within one hour after sunset, so as to effectually prevent the light from showing through the doorway, window, or aperture next or upon such street, lane, or passage: Provided that nothing herein contained shall extend to forges below the pavement of the street.

9. Any person within the distance of one hundred yards from any dwelling-house, burning any rags, bones, cork, or other offensive substance, to the annoyance of any inhabitant.

10. Driving any cart, waggon, dray, coach, hackney carriage, omnibus, gig, or any other carriage whatsoever, and not keeping to the near or left hand side of such street, road, thoroughfare, or public place or passage,

By s. 25, It shall not be necessary for any Justice to draw up or prepare any formal record of any conviction or order, unless the same shall be demanded by one of the parties to the proceedings, for the purpose of an appeal against the decision, or for an application for a writ of prohibition, or a return to some writ or other process from a superior Court. (S. 25).

By s. 26, This Act shall be incorporated and construed as part and parcel of 4 Wm. IV., No. 7, and 17 Vic., Nos. 25 & 31, and 2 Vic., No. 2; and the minimum of all fines and penalties imposed by the said recited Acts, or any of them, shall lie in the discretion of the convicting Justice or Justices.

except when passing any other carriage or vehicle, or in any manner wilfully preventing any other person from passing him, or any carriage under his care, upon such street, road, thoroughfare, or public place or passage,—or, by negligence or misbehaviour, preventing, injuring, or interrupting the free passage of any carriage or person in or upon the same; and any person having the care or charge of any such cart, waggon, dray, wain, or van, drawn by two or more horses or other beasts, riding on the same without sufficient reins to guide the animals drawing the same.

11. Driving or having the care or charge of any wain, waggon, van, cart, or dray, drawn by any horse or other animal, and driven or guided by reins, and wilfully allowing the horse or other animal drawing the same to proceed out of a walking pace.

N.B.—The owner of every such wain, waggon, van, cart, dray, as last above mentioned, shall have his name and place of abode painted in full length on the off side legibly, at least two inches high, and proportionally broad, in white letters and black ground; and if the driver, or person in charge of any such cart as aforesaid, refuse to give his or the owner's name and address, or give a false or fictitious name of himself or the owner, such person shall be detained by any constable or other person, until a satisfactory account be given to such constable or other person who may require the same.

12. Carrying goods or any frame to the annoyance of any person upon the foot-way of any street, or other public foot-way.

13. Every person being the keeper of or having any dog or other animal, which shall attack and endanger the life or limb of any person who may have the right-of-way or use of any private yard, alley, street, or any other place.

POLYGAMY.

See "BIGAMY," *ante*, p. 42.

POSTAGE. (M)

S. 15 Vic., No. 12, s. 22. [*Two Justices*].—(1) Any person knowingly sending or putting, or causing to be sent or put, to or into any Post Office, any letter or packet purporting to come within any of the exemptions, (see Act,

(M) By s. 4 of 15 Vic., No. 12, The Postmaster-General, and every other Postmaster, letter-carrier, or other person appointed under this Act, shall, before the exercise by him of the duties of his office, make and subscribe the following declaration before a Justice:—

"I, A. B., do solemnly and sincerely declare that I will not willingly or knowingly open, detain, return, or delay, or cause or suffer to be opened, detained, returned, or delayed, any letter or packet which shall come into my hands, power, or custody, by reason of my employment relating to the Post Office, except by the consent of the person or persons to whom such letter or packet shall be directed, or by an express warrant in writing for that purpose, under the hand of the Governor, or unless otherwise in pursuance and under the authority of any of the provisions in that behalf contained in any Act, law, or duly authorized regulation of the Colony of New South Wales, now or hereafter passed and made, or to be passed and made, for or in relation to the postage and conveyance of letters."

ss. 8, 12, &c.), or to belong, in respect of its contents, to one of the classes on which such lower rate of postage, as aforesaid, is chargeable, but which letter or packet shall, to the knowledge of such person, not contain solely and exclusively that which the same is authorized by this Act to contain, or shall, to the knowledge of such person, contain or have written thereon or therein some letter, paper, note, communication, writing, or thing, which under this Act would subject the same to postage or to the higher rate of postage.

P. Fine not exc. £20; if fine and costs be not paid within one week after conviction, they are to be levied by distress; if no sufficient distress, or if, at the time of adjudication, defendant declare that he has no sufficient goods, impr. not exc. 14 days from time of commitment, if fine and costs do not exceed 10s.; 1 cal. m., if the same do not exc. £1; 2 cal. m., if same do not exc. £2; and 3 cal. m., if fine and costs are of any greater amount;—unless the same be sooner paid. (5. W. IV., No. 22). See section in full, "Justices," No. 2, p. 243. (N)

N.B.—*All proceedings under this Act shall be taken in the name of H. M. Attorney-General, or of the Postmaster-General, or some other officer employed in the Post Office.* (S. 50).

S. *Id.*, s. 27. [Two Justices].—(2) The officer appointed to open unclaimed letters, opening the same and reading the contents or any part thereof, except so far as is necessary to find out the address of the writer, or divulging to anyone, except the Postmaster-General, the contents of such letter.

P. Fine £100—£5,—recoverable as offence (1),—upon complaint of the Postmaster-General.

S. *Id.*, s. 30. Two Justices.—(3) Any person having entered into a contract, in writing, with the Postmaster-General on behalf of H. M., for the conveyance of the several mails throughout the Colony, and, during its continuance, unlawfully refusing or neglecting to perform the same, or in any way omitting to comply with any stipulation or provision therein.

P. Fine £50—£5 over and above penalty secured by bond: recoverable as offence (1).

S. *Id.*, s. 33. [Two Justices].—(4) Any Master or passenger or other

(N) *Recovery of Fines*.—S. 50 enacts, That all offences against this Act, or against any rule or regulation made under this Act, in respect of which said offences any pecuniary fine or penalty is by this Act imposed, (where no other provision for the recovery thereof is in that behalf made), shall be heard and determined, and such fines and penalties be awarded and imposed in a summary way, by and before any two Justices, upon complaint in that behalf made; and all fines and penalties so awarded and imposed shall go and be distributed, and all persons aggrieved by any summary conviction under this Act shall be entitled to appeal, according to the provisions of 5 W. IV., No. 22; (see "Appeal"): Provided that no formal information shall be necessary, but that, on due service of a summons, all subsequent proceedings shall be as valid and effectual as if a formal information were filed: Provided further, that in every such summons the general nature of the complaint shall be succinctly stated, and all proceedings shall be taken in the name of Her Majesty's Attorney-General, or of the Postmaster-General, or some other Post Office employé. As this Act is subsequent to Jervis's Act, the procedure of 5 W. IV., No. 22, must be strictly followed; this was probably an oversight, but is the law, according to the maxims—*Leges posteriores priores contrarias abrogant*; and *Quod populus postremum jussit, id jus ratum esto*.

person on board of any ship or vessel delaying the delivery of, or knowingly or negligently detaining on board of such ship or vessel, or keep in his or her possession, any mail-bag, mail-box, packet of letters, let or newspaper, (except letters concerning goods on board such ship or vessel and to be delivered with such goods, and letters containing any conveyance or other deed, commission, writ, or affidavit, and letters sent by way of introduction only, or concerning bearer's private affairs), after demand made by the proper party.

P. Fine not exc. £5 for each letter, &c. : recoverable as offence (1).

S. Id., s. 34. [Two Justices].—(5) Master or Commander of any ship, &c., failing or neglecting to make the regulated declaration, (see s. 34), or making a false declaration, on his arrival.

P. Fine not exc. £50 : recoverable as offence (1).

S. Id., s. 35. [Two Justices].—(6) Any Master, Commander, or other person belonging to any steamboat or other vessel, having charge of mail where the conveyance is from one part of the Colony to another, and refusing or neglecting to deliver the same to any Port Officer or Postmaster at such port, &c., on demand, or detaining or permitting the detention of the same on board, or not using due diligence in the delivery thereof, as well as for the secure and dry custody of the same while they shall be in his charge.

P. Fine not exc. £50 : recoverable as offence (1).

S. Id., s. 37. [Two Justices].—(7) Any Master or other person having the command of any ship or vessel about to depart from this Colony, and being duly required, refusing or wilfully neglecting to receive on board any mail, or bag, or box of letters, or to give receipt for the same, or refusing or neglecting carefully to deposit such mail, bag, or box in a secure and dry place on board of such ship, or to convey the same to the place then intended voyage.

P. Fine not exc. £100 : recoverable as offence (1).

S. Id., s. 38. [Two Justices].—(8) Any Master, Commander, or other person having the charge of any steamboat or other vessel proceeding about to proceed from one port to another port in the Colony, refusing or neglecting to receive any Post Office mail on board such steamboat, and to give a receipt for the same, being thereto required.

P. Fine not exc. £50 : recoverable as offence (1).

S. Id., s. 39. [Two Justices].—(9) The Master, Commander, or other person in charge of any such steamboat or other vessel, refusing, failing or neglecting to give notice of the approach of such vessel to any such port, &c., (see s. 38), either by ringing a bell, or such other concerted signal as may reasonably be expected to be seen or heard a sufficient time before the arrival of such vessel.

P. Fine not exc. £50 : recoverable as offence (1).

S. Id., s. 41. [Two Justices].—(10) Any Port Officer, Postmaster, or other person duly authorized to receive or dispatch such mails, neglecting or failing to deliver, or retarding the delivery of, any bag, box, mail, letter, packet, or newspaper.

P. Fine not exc. £50 : recoverable as offence (1).

S. Id., s. 42. [Two Justices].—(11) Any person sending or conveying for hire any letter or packet, or taking charge of the same for such purpose.

riage or conveyance, not being a person employed in the Post Office or in the conveyance of post letters.

P. Fine not exc. £20 : recoverable as offence (1).

N.B.—*Every letter and packet sent, &c., otherwise than by post, shall be deemed to have been for hire unless the contrary be proved. S. 43 contains the authorized exceptions.*

S. *Id.*, s. 44. [*Two Justices*].—(12) Any Postmaster or other officer of the Post Office, or anyone employed by a Postmaster, or otherwise employed in the business of the Post Office, offending against, or wilfully neglecting, or omitting to comply with any rules, &c., to be from time to time made, (see Act), or the provisions of this Act.

P. Fine not exc. £50 : recoverable as offence (1).

S. *Id.*, s. 45. [*Two Justices*].—(13) The driver of any mail-coach, &c., or the guard or person in charge of the mail, &c., loitering on the road or wilfully mis-spending or losing time, so as to retard the arrival of the mail; or neglecting to convey the mail at the speed fixed by the Postmaster-General, unless circumstances of weather, accident, &c., prevent.

P. Fine not exc. £5 : recoverable as offence (1).

S. *Id.*, s. 47. [*Two Justices*].—(14) Every hawker, newsvender, or idle or disorderly person stopping or loitering on the flagway or pavement opposite the General Post Office.

P. Fine not exc. £2 : recoverable as offence (1).

S. *Id.*, s. 47. [*Two Justices*].—(15) Any driver or person having the management of any hackney carriage permitting the same to stand or ply for hire opposite the General Post Office.

P. Fine not exc. £5 : recoverable as offence (1).

S. 18 *Vic.*, No. 17, s. 9. [*One Justice (?)*].—(16) The Master, Commander, or other person having the charge of any vessel bound to take a mail, refusing, failing, or neglecting to give timely notice to the Postmaster nearest to the port, harbour, or place of such vessel's intended departure, so as to enable him to be prepared to dispatch any mail on board such vessel.

P. Fine not exc. £50 : to be recovered either by distress, (11 & 12 *Vic.*, c. 43, s. 19), or according to 5 W. IV., No. 22. See "*Justices*," No. 2, p. 243.

S. *Id.*, s. 11. [*Two Justices*].—(17) Any person wilfully obstructing the conveyance or delivery of any mail.

P. Fine not exc. £20 : recoverable as offence (16).

S. 16 *Vic.*, No. 35, s. 16. [*Two Justices*].—(18) Any person during the continuance of any (postal) contract by sea, refusing or neglecting to perform the same, or in any manner omitting to comply with any stipulation or provision therein.

P. Fine £50—£5, besides the penalty recoverable on the bond entered into by such person or his sureties : to be recovered as offence (16).

S. *Id.*, s. 18. [*Two Justices*].—(19) Master, Commander, or other person in charge of steamboat in which mails shall be conveyed between ports, post towns, or other places in the Colony, or between any port, post town, or other place, and any port, post town, or other place in any other of the Australasian Colonies, neglecting to provide a suitable locker

or other secure place, in which such mails, &c., shall be locked up and carried apart from all other articles and things; or such mails, or any post letter or packet, being carried in any such steamboat during the whole or any part of the voyage between such ports, post towns, or other places, otherwise than as aforesaid.

P. Fine not exc. £25. on such Master, &c.: recoverable as offence (16).

S. Id., s. 19. [*Two Justices*].—(20) Any person employed in the carrying, conveying, or delivering of mail-bags, &c., negligently losing any such bags, letter, or parcel, while in his charge, whether the same be or be not recovered.

P. Fine not exc. £25: recoverable as offence (16).

F. 15 Vic., No. 12, s. 16. *Bail disc.*—(1) Fraudulently forging or imitating, or assisting in forging or imitating, any stamp made under the authority of this Act; or offering, uttering, or disposing of any forgery or imitation of any such stamp, with intent to defraud the revenue, or any body corporate or politic.

P. Impr., with or without h. l.; or h. l. on roads not exc. 7 yrs.

N.B. *All proceedings under this Act (15 Vic.*, No. 12) *shall be taken in the name of the Attorney-General, Postmaster-General, or other Post Office officer.* (S. 50).

F. Id., s. 48. *Bail disc.*—(2) Any person fraudulently taking from the possession of any Postmaster or person employed to convey post letters, or from out of any Post Office or place appointed for the receipt or delivery of post letters, or stealing or embezzling, taking, secreting, or destroying any letter or packet, or mail of letters, or newspaper, or other printed paper, or any matter or thing enclosed in any such letter, packet, or mail, (sent or to be sent by post).

P. Impr., with or without h. l., not exc. 3 yrs.; or (*if male*) h. l. on roads not exc. 7 yrs.

M. Id., s. 46. *Bail comp.*—(3) Fraudulently retaining or wilfully secreting, or keeping, or detaining, or, on being required by the proper officer, refusing or neglecting to deliver up, a post letter which ought to have been delivered to any other person; or a post letter bag or post letter which shall have been sent, whether the same shall have been found by the offender or some other person.

P. Fine and impr.

M. 16 Vic., No. 35, s. 5. *Bail comp.*—(4) Any person wilfully and fraudulently removing from any Post Office stamp which has been previously used, any mark which shall have been made thereon at any Post Office, by way of obliteration or defacement for the purpose of indicating that such stamp has been once used, or knowingly or fraudulently putting off or using any such stamp.

P. Impr., with or without h. l., or h. l. on roads not exc. 3 yrs.

PRINTERS (LICENSED).

S. 8 G. IV., No. 5, s. 1. [*Two Justices*].—(1) Any person, without having delivered the requisite notice and obtained a certificate, (see s. 1), keeping or using any printing press or types for printing; or, having

delivered such notice and obtained such certificate, and using any printing press or types for printing in any other place than the place expressed in such notice. (o)

P. Fine £20; if not paid within 6 days after conviction, to be levied by distress; and for want of sufficient distress impr. not exc. 6 mths. and not less than 3 mths., or until such fine be paid. (S. 20, and 11 & 12 Vic., c. 43, s. 19).

S. *Id.*, s. 2. [*Two Justices*].—(2) Any person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, whether the same shall be sold or given away, omitting to print upon the front of every such paper, if the same shall be printed on one side only, or upon the front and last leaves of every paper or book which shall consist of more than one leaf, in legible characters, his name and usual place of abode,—or publishing or dispersing, or assisting in publishing or dispersing, either gratis or for money, any printed paper or book on which the name and place of abode of the person printing the same shall not be so printed.

P. Fine £20 for every copy so published, &c., provided that any offender shall not be liable for more than twenty-five forfeitures for printing, or publishing, or dispersing, or assisting, &c.: recoverable as offence (1).

S. *Id.*, s. 3. [*Two Justices*].—(3) Any person printing any paper for hire, reward, gain, or profit, and omitting or neglecting to write, or cause to be written or printed, in fair and legible characters, the name and place of abode of his employer on one of such printed papers, or to keep or preserve the same for the space of six cal. m. next after the printing

(o) S. 1 of 8 G. IV. No. 5, requires that every person having any printing press or types for printing in the Colony shall cause a notice thereof, signed by him, in the presence of and attested by one witness, to be delivered to the Colonial Secretary, to be registered and filed; and the Colonial Secretary is required to give a certificate of such notice having been so delivered; but now, by 16 Vic., No. 37, the notice is to be delivered to the Prothonotary of the Supreme Court, or one of the clerks of the Supreme Court authorized by the Prothonotary, and every certificate of the delivery of such notice granted by the said Prothonotary or Clerk shall have the like force and effect as if granted, &c., by the Colonial Secretary. See 13 Vic., No. 47, and 16 Vic., No. 37). Forms of the Notice and of the Certificate are in the Schedule to the Act.

By s. 4, Persons selling or distributing printed papers without the printer's name or abode, or having a fictitious name or abode, printed thereon, may be seized and detained; s. 5 contains a list of certain documents and papers excepted from the provisions of this Act; s. 6 empowers any Justices to direct by warrant a search, in the daytime, for any printing press used contrary to this Act, which, if found, may be seized and carried away.

Penalties must be sued for within three months next after the penalty shall have been incurred. (S. 7).

Justices may, in their discretion, mitigate the fine to not less than £5, over and above all reasonable costs and charges expended or incurred in the prosecution. (S. 9).

Appeal is allowed to the Quarter Sessions to be holden next after the expiration of 20 days from the date of the conviction, first giving six days' notice to the prosecutor. (S. 10).

Form of conviction of having or using a printing press or types for printing without notice, or using the same in a place not specified in such notice, or any other offence against the Act, is in the Schedule to the Act.

of imprisonment in some gaol or house of correction elsewhere than at the place where such sentence was passed,—and all prisoners under sentence of transportation, and whom it may be necessary to forward to the Metropolitan gaol, may be forwarded to such place of detention, gaol, or house of correction under a warrant from any convicting Justice, (in the case of a summary conviction), or of the Sheriff of the Colony, or of any person acting, or who shall have acted, as Deputy-Sheriff at the Assize Court or Court of Quarter Sessions at which such prisoner shall have been sentenced; and such warrants shall be a sufficient authority for all constables who may be entrusted with the conveyance of such prisoners, to keep and convey them accordingly, and for all lock-up keepers and gaolers to keep and detain them in custody for so long as convenience may require, for the purpose and in the course of such removal.

Hard Labour].—See “Escape,” pp. 99, 100, Notes (x) and (y), (where the offences are given).—22 Vic., No. 2, s. 1. The Governor may sanction labour without the walls of the gaols, not exceeding two miles, by instrument in writing under his hand; and, by s. 2, the Sheriff or other officer shall on such occasions provide proper and sufficient guard to prevent escape.

17 Vic., No. 15, s. 1. The Governor may cause any male offenders under sentence to hard labour on the roads, &c., or who shall be liable to be put to such labour under commutation of sentence, to be put to hard labour on any of the public roads, or upon any of the public streets, or other public places of any city or town, or upon any public work in or upon any harbour, or navigable river, or creek; and may cause such offender to be detained whilst not at work in any gaol, lock-up, or watch-house, or any house or other building or place, or in any ship or other vessel at or adjacent to or in the neighbourhood of the places of such employment.

Id., s. 2. Justices may direct persons under sentence to hard labour for not exc. 14 days, to be employed on any public road, street, or place of any town in the neighbourhood of gaol, &c., to which such offender shall have been committed, and such offender shall be put to hard labour under the direction and control of persons appointed by the Justices.

15 Vic., No. 5, s. 1. When any male offender shall hereafter be convicted in any Court of competent jurisdiction, or before any Justice or Justices, of any offence punishable by law with imprisonment in any gaol or house of correction, with hard labour, such Court, Justice, or Justices, at discretion, may either sentence such offender to imprisonment in any gaol or house of correction, with hard labour, for such term as by law in that behalf provided, or, in lieu thereof, may award and direct that he be kept to hard labour on the roads or other public works for such term as the said Court, Justice, or Justices shall think fit, not being more in any case than the terms of imprisonment fixed by law for such offence.

Id., s. 2. The Governor may keep any male offender who shall have been sentenced as aforesaid, during the term of his sentence, or any part or parts thereof, as circumstances may render expedient and proper, and as His Excellency shall think fit, to hard labour at any place or places which shall have been duly appointed as a place or places at which male offenders under sentence of transportation, or of hard labour on the roads or other public works in lieu thereof, shall be detained, or in any gaol or house of correction.

PROCESSIONS.

See "PROCESSIONS." 13 Vic. No. 22, s. 31.

§ 20 Vic. No. 4, c. 2, making provision 13 Vic. No. 1. [Two Justices].—Any one or more of the persons so met or assembled (see the next clause) for any dispersing and departing within one quarter of an hour from the time if the notice of command being given.

2. The offence may not be committed subsequent offence, impr. not case 3 infra. Offenders may be apprehended by warrant signed by J.

§ 20 Vic. No. 4, making provision 13 Vic. No. 1. *Band comp.*—Any met or persons meeting and parading together, or joining in procession or assembling in any public-house, tavern, or other place within the County, for the purpose of celebrating or commemorating any festival, anniversary, or political event, teaching as it connected with any religious or political distinctions or differences between any classes of Her Majesty's subjects, or of demonstrating any such religious or political distinction or difference, and wearing wearing, or having among them any firearms or other offensive weapons, or having publicly exhibited any banner, emblem, flag, or other like insignia which may be calculated to provoke animosity between Her Majesty's subjects of different religious persuasions, or being accompanied by any music of a like nature or tendency.

P. Fine or impr. or both.

N.B.—Nothing in this Act extends to processions held during an election of Members of Council.

PROCURING.

See "WORKS." (16 Vic. No. 17, s. 8).

PROMISSORY NOTES.

§ 7 G. IV., No. 3, s. 5. [One Justice].—Any person, by any act, device, or means whatever, making or issuing any promissory note, order, draft, or undertaking in writing, being negotiable or transferable, for a sum less than twenty shillings sterling.

P. Fine £20—£5: to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to 5 W. IV., No. 22. See "Justices," No. 2, p. 243.

N.B.—By s. 4, all bills of exchange, promissory notes, orders, &c., are declared to be absolutely void.

(a) By s. 2. Any Justice or Justices shall and may proceed, with necessary assistance, to the place where any procession or meeting of persons hereby declared to be unlawful shall be held or take place, and such Justice, &c., or some person by him, &c., order, shall then and there read and repeat aloud to the persons so assembled a command or notice to disperse in the words or to the effect following, *i.e.* :—
"Our Sovereign Lady the Queen doth command and charge all persons being here assembled immediately to disperse themselves and peaceably to depart, upon the pains contained in the Act of the Governor and Legislative Council of New South Wales passed in the tenth year of the reign of Her Majesty Queen Victoria, intitled 'An Act to prevent Party Processions and certain other public exhibitions in the Colony of New South Wales.'"

PUBLIC EXHIBITION.

See "THEATRE." (14 Vic., No. 23.—Repealing 9 G. IV., No. 14).

PUBLIC WORSHIP.

See "CHURCH."

PUBLICAN (LICENSED).

(13 Vic., No. 29).

License].—By s. 4, There are three kinds of licenses :—a Publican's General License ; a Packet License ; and a Confectioner's License. (For Forms, see Act). If granted at the annual licensing meeting, or at any transfer meeting held before the 1st July next after such annual licensing meeting, they shall commence from such date, and both such licenses shall continue in force until the 30th of June next ensuing inclusive, (unless sooner forfeited), and no longer. (S. 4).

Publican's License].—A publican's license shall authorize the person thereby licensed to sell and dispose of any fermented or spirituous liquors, or any mixed liquors, part of which is fermented or spirituous, in any quantity, in the house or on the premises therein specified : Provided that no such license shall be held to authorize any such sale in any place where a retail shop is kept, upon pretext of refreshment allowed to customers, or otherwise howsoever. (S. 5). See ss. 6 & 7 as regards packet or confectioner's license.

Licenses extended to Fairs, Ralls, &c.].—Any person holding a publican's or confectioner's license can obtain from two or more Justices in Petty Sessions in the city, town, or police district in which any lawful fair, &c., shall take place, an authority (marked E.,—see Schedule of Act), extending license to such fair, &c., to which it shall apply, and for the time therein stated : Provided that no such fair, &c., (if out of the district of any such licensed person), shall be more than ten miles distant from such licensed house. (S. 8).

Disqualified persons].—No license to be granted or transferred to any person holding office or employment under Government, nor to any constable, or bailiff, or licensed auctioneer ; nor to any person, nor the wife of any person, serving under sentence for any criminal offence, whether any such offence be partially remitted or not, (unless by pardon granted by competent authority) ; no publican's license to be granted for any premises of which a constable is the owner, landlord, or proprietor, or wherein such constable has any partnership or interest : Provided that no person holding office or employment under Government, nor constable, nor bailiff, nor person serving under sentence, &c., shall be taken as surety in any recognizance to be entered into under this Act. (S. 9).

Justices disqualified to act at Licensing Meetings].—No Justice who shall be a common brewer, malster, or distiller, or retailer of fermented or spirituous liquors, or concerned in partnership with any common brewer, &c., shall act in, or be present at, any annual licensing meeting, or at any adjournment thereof, or at any Special Session for granting or transferring certificates for licenses under this Act, or shall take part in the discussion

[illegible][illegible][illegible]

Appellate in the District Court. — Where a writ is made, see s. 13.
 Annual meeting of Justices. — At the annual meeting of the Justice of the peace holding a court in the district a reported district Justice, or a Justice acting as such, shall be held, shall be holden in the morning, and Justice or Justices of the meeting on the third day of April at 2 o'clock is used, for considering the applications for license, and those of such Justices shall be sufficient to constitute a meeting of the Justice of the peace. Provided that wherever there shall be less than seven such Justices acting for or resident in any district where such meeting shall be held, then the number of Justices so acting for or resident in, such district shall, after one o'clock, be sufficient to constitute such meeting, and to proceed with the business thereof. (S. 15).
 The majority of such Justices may adjourn the consideration of such applications from the day of such annual meeting to any other day they shall

agree upon, provided that such adjournments do not, in the whole, exceed one cal. month from the day of the annual meeting. (S. 16). Whenever at any annual licensing meeting to be holden in any police district, or at any adjournment thereof, two Justices usually acting for or residing in such district shall not be present at one o'clock of that day, at the Court House or place of meeting, any one Justice, acting for and resident as aforesaid, being present, may adjourn or further adjourn the said meeting for one week, (notwithstanding the previous limitation), and cause notice of such adjournment to be given to all other Justices acting for or resident in such district; and if at such adjourned meetings there shall not be two qualified Justices, usually acting for or resident in such district, one such Justice may do all such acts as an annual licensing meeting are by this Act empowered to do. (S. 17).

Every such annual licensing meeting and every adjournment thereof shall be held in open court, and every consideration of any application, or of any objection to such application, shall be deemed and taken to be a judicial proceeding, and it shall be the right and privilege of any resident in the neighbourhood of the house proposed to be licensed, or of any other applicant for a license, or of any person already licensed in the district, or of any Chief Constable or Inspector of the district, to oppose any such application; and the Justices there assembled may hear, inquire into, and determine such objections, and summon or call and examine, on oath, necessary witnesses, and grant to those approved of by the majority, after taking the recognizance as hereinafter required, certificates authorizing such license. See Form D., (s. 18).

The Clerk of Petty Sessions shall cause a notice of each annual licensing meeting to be inserted at least one calendar month before the holding thereof, in the *Government Gazette*, and also to be affixed to the door of the Court House in which the same are to be holden; but no omission or irregularity in any such notice shall affect the authority vested in the annual licensing meeting held conformably in other respects to the provisions of this Act; and the clerk also shall cause a notice of the time of holding such meeting, or adjournment thereof, to be served on every Justice acting for or usually resident in such district, who is required to attend on such occasion unless prevented by sickness or other reasonable cause. (S. 19).

Applicants to enter into Recognizance.—Before the Justices shall deliver any certificate to authorize the issue of a license to any applicant for the same, the latter shall enter into a recognizance, with two sufficient sureties, in the sum of £50 each; if applying for a publican's license, in the form and with the conditions in the Form A. 3, (see Schedule of Act); if for a packet license, in Form B. 2; if for a confectioner's, in Form C. 3. (S. 20).

Applicants absent through illness.—If any person, desirous of obtaining a certificate, be hindered by sickness or infirmity, or any other reasonable cause, to be proved to the satisfaction of the majority of the Justices assembled, or of the Justice, if only one then present, and having authority to grant such certificate, from attending in person at any such meeting or adjournment thereof, the said Justices or Justice may certify in favor of such person, upon three sufficient and approved sureties entering into the required recognizance, in £50 each. (S. 21).

Recognizances, mode of taking.—All such recognizances shall be entered into in the presence of two, at least, of Justices assembled, as aforesaid, and signed by them, except in case where one Justice acts alone, as before provided, and then the recognizances may be entered into before, and signed by, such Justice only. (S. 22). Such recognizances, with their conditions, shall be regularly recorded in the records of each Petty Sessions district, and shall also, within one calendar month after the same are entered into, be transmitted by the Clerk of Petty Sessions to the Clerk of the Peace acting for the Court of General Quarter Sessions held in the city, town, place, or district in which such Petty Sessions are held; and, if there shall be no such Court of Quarter Sessions held, then to the Clerk of the Peace acting for the Court of Quarter Sessions held in the district nearest to such Petty Sessions. (S. 23).

List of Certificates to be sent to the Colonial Treasurer.—The Justice or Justices by whom certificates are granted by virtue of this Act, shall transmit to the Colonial Treasurer, or other person appointed by the Governor for the purpose of issuing licenses under this Act, within 14 days from the granting thereof, a list signed by two, at least, of the Justices, (if two shall have acted, and if only one, by that one only), specifying the names and residences of all persons to whom such certificates shall have been granted, and of their respective sureties, and the nature of the license granted by each certificate; and specifying further, in the case of publicans' licenses, the situation and sign or name of each house, and street or place in which it shall be situate, and its distance from the nearest licensed house in each street, place, or line of road, or on the line of road on which the same is situate,—the name of the owner or proprietor,—whether before licensed or not, and, also, the names and residences of the sureties. (S. 24).

Certificates void unless lodged, &c.—Every such certificate shall be null and void, unless the same, and the sum required to be paid for such license, be lodged in the office of the Colonial Treasurer, or other person appointed by the Governor, on or before the 30th of June next ensuing each annual licensing meeting; and the said Treasurer, or other person, shall forthwith after the receipt of every such certificate and list, issue and register a license (see Form in Act) according to the tenor of each such certificate respectively, upon payment being made to him of the sum of £30 for publican's license, £2 for packet license, and £1 for confectioner's license. (S. 25). Notwithstanding default in lodging such certificate, or in paying the required sum, whereby such certificate shall become void, the Governor, if he shall deem fit, upon representation to him made of the circumstances occasioning such default, may direct the issue of the license for which such certificate shall have been granted, on payment of not more than £10 in addition to the payment mentioned before: Provided that such payment be made within one calendar month of the time limited for the payment of the money for such license, as aforesaid. (S. 26).

Governor may direct the issue of Licenses in certain cases.—More recently it has been provided, The Governor, whenever he shall be satisfied that any applicant for a license has, from the non-attendance of qualified Justices at the proper time for granting the certificate required by law, or from any other cause without default or neglect on his part,

been unable to obtain the certificate at the time and in the manner appointed, may order and direct that a license may be issued to such applicant, upon his entering into the required recognizances and paying the duty required by the Act: Provided that it be certified to the Governor by two Justices resident in the Police District in which the applicant's house is situate, that the licensing such house would be a convenience to the public, and that the applicant is, in such Justices' opinion, a fit and proper person to hold a publican's license. (17 Vic., No. 6, s. 1).

Colonial Treasurer may issue Packet Licenses in special emergencies.—The Colonial Treasurer, upon a proper certificate, signed by two or more Justices, together with the sum required to be paid for such license, being lodged in the office of the Colonial Treasurer, or other duly appointed person, and the Master or Commander having entered into the necessary recognizance, may authorize the issue of a packet license at any period of the year, to take effect and remain in force until 1st July next ensuing the date thereof: Provided the applicant for such license shall not have been refused a certificate for a license by any meeting of Justices to which he may have applied for the same. (S. 27).

Governor may renew Licenses without Certificate in certain cases.—The Governor, whenever he shall be satisfied that any person applying to have his license renewed has, by reason of the non-attendance of any qualified Justice at the annual licensing meeting, or any adjournment thereof, or from any other cause, without any default or neglect on his part, been unable to obtain the certificate aforesaid at the time and in the manner appointed, shall order and direct that a new license be issued to any person so applying, upon his entering into the recognizances and paying the money required by the Act. (S. 28).

Justices at Petty Sessions for Transfer of Licenses may grant Certificates.—If it shall appear proper to the majority of the Justices at any Special Petty Sessions on any day hereinafter mentioned for the transfer of licenses, such Justices may grant to such persons as shall in their discretion be approved by them, after entering into the recognizances required by this Act, certificates to authorize the issue of licenses to any such persons; and the Colonial Treasurer or other duly appointed person shall, and he is hereby authorized and required, forthwith after the receipt of every such certificate [to?] issue and register in his office a license, to continue in force until the first day of July then next ensuing, in one or other of the Forms hereinbefore prescribed, according to the tenor of each such certificate respectively, upon payment to the said Colonial Treasurer, or other appointed person, of a sum proportionate to the period such license shall have to run from the day of the issue thereof until the said first day of July, according to the several and respective rates hereinbefore directed: Provided that notice of such application, with the names of the householders signing the certificate, and all other notices required by this Act, be given or posted up, at least, twenty clear days before such application can be heard. (S. 29).

Special Sessions for Transferring Licenses.—Special Petty Sessions shall be holden on the first Tuesday in September, December, and March, in every year, in each town, city, or police district in which such annual licensing meeting shall be holden as before directed, for receiving applications for transferring licenses, which meetings shall be subject to the same

rules as the annual licensing meeting, and have like powers of adjournment, and the like power shall devolve upon any one Justice, after adjournment by him for one week, in default of attendance of any other Justice or Justices to whom notice shall be given as aforesaid. (S. 30). Such Justice or Justices may transfer the license of any person licensed to the appointee of the original holder of such license, if eligible and approved of by them, by an indorsement upon the original license in the Form F., (see Schedule), or to the effect thereof, such appointee entering into the same recognizance, and producing also the same certificate, as the original party obtaining the same is bound to enter into or produce: Provided that one week's notice, at least, of such intended transfer to such transferee shall be duly published, as required in respect to applications for licenses at the annual licensing meeting. (S. 31). Such Petty Sessions for transferring licenses shall be held in open court, and every proceeding thereat for granting or transferring licenses shall be deemed and taken to be judicial, and all objections may be made, inquired into, and determined in same manner as provided for applications for licenses at the annual licensing meeting. (S. 32).

Devolution of License on Trustees, Executors, &c.].—In case of the decease or insolvency of the person holding a license, his executors, administrators, or trustees, as the case may be, shall be entitled to carry on the business of the person so licensed, by an agent, to be specially authorized, in writing, by any one Justice, for that purpose, and to act under the authority of the said license, without any renewal or formal transfer thereof, during six months, if the license have so long to run, or until the next licensing day following the date of such licensed person's decease, or of the vesting of his property in trustees, as the case may be: Provided that such license shall be subject to the same regulations as if it had continued to be holden by the original grantee, and that new recognizances, with sufficient sureties, be entered into by such executors, administrators, or trustees, or agent, respectively, before the Justices assembled at the next Special Petty Sessions for the district, held in pursuance of this Act, ensuing the date of such decease or legal vesting as aforesaid, or before any Justice or Justices of the city, town, or district, who shall previously require the same to be entered into. (S. 33).

Licensed person desirous of removing to another house.].—If any person, having duly obtained a publican's license, shall desire to remove his business from the house expressed in such license to any other house within the same district, at any time after the issue of such license, and before the next general licensing meeting, then, upon application made by such person to the Justices of the district in which the original license was granted, the majority of the said Justices in Petty Sessions, or any two or more of them, if they approve of the house proposed to be licensed, after such person shall have entered into a new recognizance, with such sureties as aforesaid, may grant a certificate authorizing the Colonial Treasurer, or other person duly appointed to issue licenses, to affix his signature to a memorandum, to be endorsed upon or affixed to the original license, in the Form G., or to the effect thereof, by virtue whereof the said license shall be thenceforth transferred during the remainder of the time the same has to run to the house or premises mentioned in such certificate, and shall cease to apply, except so far as regards acts or liabilities already performed

or incurred, to the house and premises for which such license was originally granted : Provided that the notices before required in respect to applications for licenses at the annual licensing meeting, be duly posted. (S. 34).

Transfers to be reported by Clerk of Petty Sessions].—Every transfer of a license authorized by any Justices, whether as regards the person or house to which the license shall apply, shall, within 14 days after such transfer, be duly reported to the Colonial Treasurer, or other person appointed to issue licenses, by the Clerk of the Petty Sessions by which such transfer shall be authorized. (S. 35). See offence.

Abandoning occupation, &c.].—By s. 49, If any licensed person be convicted of felony or misdemeanor in any criminal Court, and sentenced to transportation or imprisonment, or abandon the occupation of his or her licensed house as his or her usual place of residence, or permit any person whomsoever to manage, superintend, or conduct the business of such house, or shall, whether residing in such house or not, permit any unlicensed person to become, virtually or in effect, the keeper thereof, then or in either of the said cases, upon complaint thereof and proof of the fact to the satisfaction of any two or more Justices, the license of such house for the current year shall become and be absolutely void, anything hereinbefore contained to the contrary notwithstanding, and such house or place shall thenceforth be held to be unlicensed.

S. 13 Vic., No. 29, s. 2. (s) (T) [Two Justices].—(1) Any person

(s) This Act does not apply to any person selling any distilled or spirituous perfume, *bonâ fide* as perfumery, and not for the purpose of drinking; nor to any person practising as an apothecary, chemist, or druggist, who may administer or sell any spirituous or fermented liquors as medicine or for medicinal purposes; nor to any person who (within Sydney, &c., and such other towns as shall by the Governor, by notice in the *Government Gazette*, be declared to come within the operation of this clause) shall dispose of any quantity not less than two gallons of any fermented or spirituous liquors, or any mixed liquors, part of which is fermented or spirituous, if such quantity do not include less than two gallons of any one description of liquor, and is not delivered in quantities less than two gallons at one time; nor to any person who (within Liverpool, Campbelltown, Wollongong, Berrima, Goulburn, Bathurst, Penrith, Richmond, Morpeth, Carrington, or Port Macquarie, and such other towns as shall by the Governor, by notice in the *Government Gazette*, be declared to come within the operation of this clause) shall dispose of any quantity not less than two gallons of any fermented liquors containing a quantity of alcohol not exceeding 25 per cent.; nor to any grower or maker of wines from grapes the produce of the Colony, who shall dispose of the same in any quantity not less than two gallons; nor to any person who may give wine or beer made from grapes or grain of his own growth, or beer brewed by him from sugar for the use of his own establishment, in part payment of wages to labourers on lands owned or rented by him; nor to any duly established military canteen. (S. 3).

In *ex parte Griffin v. Tumut Bench*, (October, 1854), on motion for prohibition, it was held that the Bench was bound to take judicial notice of the Government proclamation of Tumut as a place where liquor could be sold in quantities greater than two gallons, although their attention had not been called to it by the defendant. The proclamation issues under the Act, and becomes virtually incorporated with it.

(T) *Information to be laid within three months*].—No conviction shall take place under this Act unless the information shall have been laid within three cal. months next after the commission of the offence complained of.

A Retailer of fermented or spirituous liquors shall be held to be a person who sells in any quantity under 25 gallons at any one time. (S. 88).

selling or disposing of, in any house or place within the Colony, any fermented or spirituous liquor, or any mixed liquor part of which is fermented or spirituous, or permitting or suffering any such liquor to be sold or disposed of by any other person in his house or other place within the said Colony, without having first obtained, in manner and form hereinafter directed, a license sufficiently authorizing such sale or disposal. (v)

P. (1st offence), forfeit £30, together with costs; or impr. with h. l. not exc. 3 cal. m., together with such penalty; (17 Vic., No. 6, s. 3); (subsequent offence), forfeit £50, together with costs; or impr. with h. l. not exc. 6 cal. m., together with such penalty. (17 Vic., *Id.*) If pecuniary penalty,—on non-payment of fine and costs, distress; in default of distress, impr. not exc. 14 days where fine does not exc. £5; and not exc. 3 cal. m. where the fine is of greater amount; (13 Vic., No. 29, s. 69; 11 & 12 Vic., c. 43, ss. 19 & 22); the procedure of Jervis's Act is to be followed. An abstract of the more elaborate procedure prescribed by 13 Vic., No. 29, is added:—On non-payment of fine and costs, distress warrant for fine and costs, and 5s. for the distress, may be issued by the convicting Justices, or either of them, not exc. 14 days from day of conviction, returnable on such day, not being more than 14 days from the date of warrant, to be inserted therein by the Justices; if no goods can be found whereon to levy such fine and costs before the return day of warrant, on the same being duly certified in writing on the back of such warrant, the convicting Justices, or either of them, may commit to gaol nearest to the place of conviction for not exc. 14 days, where fine does not exc. £5; and not exc. 3 cal. m., where the fine is of greater amount. The impr. to be computed from time of arrest, if endorsed on warrant by constable, &c. See S. 69 in full, Note (w)

(v) *Evidence.*—*Delivery prima facie proof of sale*.—To remove doubts as to what is a selling or disposing of liquors contrary to this Act, it is enacted, That the delivery of any such spirituous or other liquors shall be good and sufficient *prima facie* evidence of money or other consideration being given for the same, so as to support a conviction, unless proof shall be made to the contrary, to the satisfaction of the Justice hearing the case. (S. 76).

(w) *Penalties, how to be recovered, Procedure, &c.*—Except where otherwise provided, any person may exhibit a complaint in writing, before any Justice, of any offence against this Act; and, on perusal of such complaint, if the same be a valid one, such Justice shall grant a summons in writing under his hand, directing the attendance of the defendant at a time and place to be therein mentioned, to appear before any two Justices to answer such charge; and, if the summons be served personally on the defendant, or be left at his last known and usual place of abode, with some inmate thereof, at least twenty (*quare* twenty-four?) hours before the time therein mentioned for such person's appearance, then, upon the appearance of the party so summoned at such time and place, or on proof to be then given *visd voce* on the oath of the party by whom such summons was so served as aforesaid, and the production of the original summons, any two Justices then and there being, thereupon, or at any future period to which the matter may be then adjourned by any one Justice, if two should not be present, shall proceed to hear and determine the matter complained of; and, on conviction of the defendant, the convicting Justices, or either of them, in case of a penalty being awarded, on non-payment thereof and such costs as such Justices may award, may issue, at any time not more than fourteen days from the date of conviction, under his or their hand and seal, a warrant of distress, returnable on such day as they may insert therein, such return not being more than fourteen days from the day of the date of the warrant, authorizing any constable to levy on the defendant's goods, if

N.B.—Upon conviction, such person is incapable of holding any license under this Act for 3 years from time of such conviction. Half the penalty

such can be found, for the penalty and costs, and 5s. for such distress; and the said goods forthwith to seize and carry to the nearest police office; and the goods so seized shall be sold at twelve o'clock on the third day after the same shall have been taken to such police office, unless the penalty and costs be sooner paid; and the surplus, if any shall remain after payment of the penalty and costs, shall be paid to the defendant, if demanded within one month, and, if not so demanded, shall be paid to the treasurer of the nearest hospital or charitable institution within the local jurisdiction of which such conviction shall take place; and, if no goods can be found before the return day of the said warrant whereon to levy, on the same being certified by writing on the back of such warrant to the convicting Justices, or either of them, under the hand of the person appointed to execute the same, the said convicting Justices, or either of them, forthwith, by warrant under his or their hand and seal, may commit the defendant to the common gaol nearest to the place where the conviction took place for any period not exceeding fourteen days where the penalty shall not exceed £5, and not exceeding 3 calendar months where the penalty shall be of greater amount,—such term of imprisonment to be computed from the time of arrest, and not from date of warrant. The party making the arrest is required to endorse on the back of such warrant the date of such arrest, under a penalty of not exceeding £5, to be recovered summarily: Provided that neglect to endorse such warrant shall not vitiate the arrest, but, in such case, the imprisonment shall run from date of warrant; and provided that all such proceedings by summons may be had and done without a formal information being exhibited, and such proceedings shall be as good, valid, and effectual to all intents as if a formal information in writing were exhibited, provided that in every such summons the general nature of the complaint shall be succinctly stated. (S. 69).

In *Carter v. Wollongong Bench*, (December, 1855), a fine of £50 had been imposed as for a second conviction, when there was no sufficient evidence before the Magistrates of any former conviction. On motion for a prohibition, the Court sustained the conviction, but reduced the fine from £50 to £30.

In *R. v. Hally*, (Shadforth Judgment, 1850, p. 14), it was decided that a commitment in execution under s. 69, for the amount of penalty and costs as thereby authorized, after no goods found on levy, is bad, if it includes the 5s. mentioned in this section for the expenses of the distress.

In *ex parte Solomon v. Bombala Bench*, (July, 1854), the defendant was convicted on an information in writing for illegally delivering a quantity of wine less than two gallons; the conviction was quashed; a verbal charge was sufficient, but in this case there had been a written information, in which there was a palpable defect: illegal delivery of liquor was the offence charged, but this was, in fact, no offence at all; it was *prima facie* evidence of the offence of illegal selling.

In *re Thorpe*, (1851), a memorandum—We sentence defendant “to pay a fine of £50, and the costs of the case: to be allowed fourteen days for payment; in default of payment, to be committed to Brisbane gaol for three months”—was held to be bad. Instead of fourteen days for payment, a distress warrant should have issued. It was held, also, that the Magistrates might convict, though the liquor was not seized and brought before them.

Evidence.—A prohibition was granted against a conviction under the Publican's Act, by Mr. Justice Milford, because the wife of the defendant had been examined as a witness—*In re Charles Weston v. Cox*, (June, 1859).

Appeal.—By s. 77, Any person aggrieved by any fine or penalty imposed above £5, or by any act of any Justice or Justices under this Act, (unless such act relate to refusing a certificate for the granting, renewal, or transfer of a license, or the cancellation of a wine and beer license, as hereinbefore mentioned), may appeal against such act to the Court of Quarter Sessions, according to the provisions of the law which shall be in force for the time being for the general regulation of appeals of such or the like nature. See “Appeal,” p. 7.

Appropriation of Penalties.—By s. 81, All fines and penalties under this Act, except for drunkenness, and such as are otherwise appropriated, shall be paid—one moiety to Her Majesty for the public use, and the other part to the informer

is to be received by any Chief or other constable suing or informing for the same under this section. (17 Vic., No. 6, s. 4).

S. Id., s. 36. (x) [Two Justices].—(2) Any person holding a license under this Act, except a packet license, having or keeping, or allowing to be kept, in and about his house, premises, or appurtenances, or at any place connected with the same in any way whatever, any skittle-ground or ball-court, or any dice, cards, bowls, billiards, quoits, or other implements used in gaming,—or suffering any person resorting thither to use or exercise any kind of said games, or any other unlawful game or sport, within his said house, premises, or appurtenances,—or any such licensed person offending against the tenor of his or her license, or in any respect committing a breach of any condition of the recognizance by him or her entered into. (y)

or prosecutor; and drunkards' fines are now (by 17 Vic., No. 6, s. 5) to be paid to the treasurer or other authorized officer of any benevolent asylum, hospital, infirmary, dispensary, or other charitable institution or society established or to be established nearest to the Court of Petty Sessions where the case shall be heard, for the relief of such poor persons as, through age, sickness, accident, or other infirmity, are unable to support themselves: Provided that the convicting Justice or Justices may direct that no portion of the penalty shall go to the informer. (S. 82).

If Appeal lost, Appellant to pay Costs.—S. 78. Where notice of appeal shall have been given, and such appeal be dismissed, or the judgment appealed against be affirmed, or the appeal be abandoned, the Court appealed to is required to adjudge and order that the appellant shall pay to the Justice or Justices to whom such notice shall have been given a reasonable sum by way of costs, which if appellant refuse or neglect forthwith to pay, the said Court may commit him to gaol till such sum be paid; and where the judgment so appealed against shall be reversed, the Court may order the Justice or Justices to be indemnified from all costs and charges to which he or they shall have been put by such appeal, and recommend to the Governor or Acting Governor, who is hereby authorized, on such recommendation, to appropriate a sufficient sum for this purpose from the funds arising from the licenses taken out under this Act. (S. 78).

Form of Conviction.—A conviction in the form in Schedule H, shall be good and effectual to all intents and purposes. (S. 79).

Action against Justice, &c., to be commenced in three months.—S. 80. No action shall lie against any Justice or constable for or on account of any matter or thing whatsoever done or to be done or commanded by him in the execution of his duty or office under this Act, against any party offending, or suspected to be offending, against this Act, unless there be proof of corruption or malice, and unless such action be commenced within three calendar months after the cause of action or complaint shall have arisen; and, if any person shall be sued for any matter or thing which he has so done or shall have done in the execution of this Act, he may plead the general issue, and give the special matter in evidence.

(x) *Evidence.—Proof of License.*—In any proceedings against any person alleged to be a licensed person, and liable as such to any such proceeding, the production of his or her recognizance, as entered into and recorded in manner directed, shall be conclusive evidence, not only of such recognizance, but also of his being licensed in manner therein recited: Provided that any such Justice, &c., (not being assembled as a Court of Quarter Sessions), in his or their discretion, may admit any other proof which shall seem satisfactory of any such recognizance, or the contents thereof, or as to the fact of any person being licensed in manner and form alleged in any such proceeding; but, in case any question shall arise relating to any such license or recognizance, upon appeal or otherwise, before any Court of Quarter Sessions, under this Act, then such question shall be decided only by the production of such recognizance. (S. 73).

(y) Provided that, on application being made as hereafter required to any Bench of Magistrates, of whom a Police Magistrate, if there be such, shall be one, they may, at their discretion, grant a written permission to any licensed person within

P. Fine not exc. £20, with costs : to be recovered as offence (1).

S. Id., s. 37. [*Two Justices*].—(3) Any person having or keeping any house, shop, room, or place of public resort, (wherein provisions, liquors, or refreshments of any kind shall be sold or consumed, and whether the same shall be kept or retailed therein, or procured elsewhere), and wilfully or knowingly permitting drunkenness or other disorderly conduct in such house, shop, room, or place, or knowingly suffering any unlawful games or gaming whatsoever therein, or knowingly permitting or suffering prostitutes or persons of notoriously bad character to meet together and remain therein. (2)

P. Fine not exc. £10 : to be recovered as offence (1).

S. Id., s. 38. (Note E) [*Two Justices*].—(4) Every holder of a publican's general license failing or neglecting to have his name at length painted in legible letters, at least three inches long, with the words "licensed to retail fermented and spirituous liquors," constantly and permanently remaining, and plainly to be seen and read, on a conspicuous part of his house or appurtenances; or to keep a lamp affixed over the door of his house or within twenty feet thereof, lighted and to be kept burning the whole of each and every night, from sunset to sunrise, during the time of his holding such license,—every such lamp, if lit with oil, having at least two burners, or one burner if lit with gas.

P. Fine not exc. £5 : to be recovered as offence (1).

S. Id., s. 40. [*Two Justices*].—(5) Any licensed house not being provided with the accommodation required, (A) or such as shall be required, by the conditions of any recognizance, and inserted therein.

their respective districts to allow the game of billiards to be played in his or her licensed house on any day,—Sunday, Good Friday, and Christmas Day excepted,—on payment to the Colonial Treasurer of the sum of Ten pounds, in addition to the sum to be paid in like manner as before-mentioned for his or her license, and also of the sum of Ten pounds hereafter required to be paid for dispensing with the restrictions, or part thereof, in respect to the hour of closing houses licensed under this Act : Provided also, that notice of such last-mentioned application shall have been given, and be posted as other notices as aforesaid, at least one week before such application can be heard : And provided always, that no recognizance entered into in pursuance of this Act shall be put in suit or estreated unless by the consent and direction of Her Majesty's Attorney-General. (S. 36). This section not only prohibits gambling : it makes it an offence that any dice, cards, &c., or other implements of gaming should be even kept in a licensed house, whether really used for gaming or not ; it is sufficient to disclose the presence of cards in the defendant's house ; if the cards are of any other character than those contemplated by the Statute, it is matter for defence. The information should be for permitting a game of cards, instead of the game. (*In re Singleton v. Darcey*, July, 1858) ; and, on estreating recognizances, see *ex parte Cavanagh*, February, 1851.

(2) Proof of disorderly conduct is not necessary to justify a conviction ; but a Magistrate is not bound to convict on mere proof that prostitutes have been allowed to remain in the house for a reasonable time. (*Greig v. Bendino*, 27 L. J. M. C., 294).

(A) By s. 39, Every house for which a publican's general license shall be granted shall, at the time of granting such license, contain at least two moderately sized sitting-rooms, and two sleeping-rooms, actually ready and fit for public accommodation, independent of the apartments occupied by the family of the publican ; and shall also be provided with a place of accommodation on or near the premises for the use of the customers thereof, in order to prevent nuisances or offences

P. License to be adjudged and declared forfeited.

N.B.—*License thereupon and thenceforth null and void.*

S. Id., s. 41. [Two Justices].—(6) Any holder of a publican's general license upon any line of road in the Colony, refusing, without reasonable cause, to receive a traveller as a guest into his or her house, or to find any such traveller victuals or lodging, or to receive the horse or horses of a traveller, and provide such horses with sufficient provender, whether the owner lodge in the house or not.

P. Fine not exc. £20: to be recovered as offence (1). (b)

S. Id., s. 42. Two Justices].—(7) Any holder of a license under this Act, permitting in his house, or any of the appurtenances thereto, any person to become drunk, or supplying or permitting any fermented or spirituous liquor to be supplied or given to any person in a state of intoxication, or permitting such person (not being an inmate thereof) to remain in his or her house, or any of its appurtenances.

P. Fine not exc. £5: to be recovered as offence (1).

S. Id., s. 43. [Two Justices].—(8) The goods and chattels, the *bond fide* property of any stranger, and being in a licensed house, or the appurtenances thereof, or any place used or occupied therewith in the ordinary course of resort at such licensed house, if seized or distrained for rent for such licensed house or appurtenances, or in respect of any other claim whatsoever against the said house or appurtenances, or the owner thereof.

P. Such goods, &c., to be ordered to be restored to the owner or proprietor thereof; and, further, such reasonable costs to be awarded as shall be incurred by such summary proceedings; such costs to be levied by distress of goods of person distraining or seizing such goods. (c)

N.B.—*Every house, for which a publican's general license shall be granted, shall be considered as a common inn.*

against decency; and shall also, during the continuance of such license, be provided with stabling sufficient for the accommodation of six horses at the least, and with a sufficient supply of hay, corn, or other wholesome and usual provender for the horses of travellers: Provided always, that it shall be lawful for the Justice or Justices granting a certificate for such license as aforesaid in either of the cities of Sydney, Newcastle, or Melbourne, by writing under his or their hands, to dispense with such part of the accommodation for horses specified herein as he or they may think fit: Provided also that, in the granting of a certificate for a license by any Justice or Justices as aforesaid, if it shall appear to him or them expedient to grant such certificate upon any other or special conditions with respect to the extent of accommodation to be afforded to the public, in addition to the accommodation hereinbefore provided, it shall be lawful for such Justice or Justices to insert the same in the recognizance of the person to whom such certificate shall be granted; and in every such case the conditions so to be inserted shall, so far as regards such person, be taken to be the conditions imposed and binding upon him or her under the present section of this Act.

(b) It is a question of fact what is a "traveller," but a person is not less a traveller, within the meaning of the Act, because he travels on pleasure. *Atkinson v. Sellars*, (28 L. J. M. C., 12); and see *R. v. Dind*,—November, 1854, (Part III.)

(c) By s. 44, No action can be maintained on account of liquors sold contrary to the Act, and no licensed person can recover for any spirituous liquor sold and delivered in quantities less than two gallons, and delivered and taken away all at one time; but this provision does not extend to prevent innkeepers from keeping an account with *bond fide* lodgers and travellers, (see Note (b), and recovering any charge for spirits included therein.

S. Id., s. 45. [*Two Justices*].—(9) The holder of any license under this Act taking or receiving from any person whomsoever, in payment or in pledge for liquors, or for any entertainment whatsoever, supplied in or out of his house or premises, any article of clothing or slops, or any tool, or other article or thing, excepting metallic or paper money, or a cheque or order for the payment of money.

P. Fine not exc. £10, (independent of other legal liability): to be recovered as offence (1).

S. Id., s. 46. [*Two Justices*].—(10) Any licensed person retailing liquor, when required by any guest or customer purchasing such liquor, in other than vessel seized to full imperial measure, (except in quantities less than half-a-pint).

P. Forfeit illegal measure and pay not exc. £5: to be recovered as offence (1).

N.B.—See similar provision, "Weights and Measures," *post*.

S. Id., s. 47. [*Two Justices*].—(11) Any person whosoever, whether licensed or unlicensed under this Act, selling, supplying, or giving any spirituous liquor, or mixed liquor whereof part is spirituous, in any quantity whatever, or any fermented liquor, or mixed liquor, part whereof is fermented, in any quantity which shall produce intoxication, to any Aboriginal native of New South Wales or New Holland.

P. Fine not exc. £5, (over and above any penalty incurred for the sale of such liquor without a license): to be recovered as offence (1).

S. Id., s. 48. [*Two Justices*].—(12) Any licensed person keeping his house open for the sale of any liquor, or selling or retailing any liquor, or suffering or permitting the same to be drunk or consumed in his house, or on his premises, at any time before 4 o'clock a.m., or after 10 o'clock p.m., from the 1st October to the 31st March, or before 6 o'clock a.m., or after 10 o'clock p.m., from the 1st April to 30th September, (both inclusive), on any day of the week, or at any hour on a Sunday, Good Friday, or Christmas Day, (except as hereinafter provided).

P. Fine not exc. £2: to be recovered as offence (1). (D)

(D) Every separate sale is a separate offence, but this does not prohibit sale or delivery of liquor at any time to *bond fide* lodgers or inmates, or travellers seeking refreshment on a journey, (see recent case of *Atkinson v. Sellers*, 28 L. J. M. C., 12), or prevent the sale of wine or other fermented liquors on Sundays, Good Fridays, or Christmas days, between the hours of one and three o'clock, if the same shall not be sold for the purpose of consumption or allowed to be drunk upon the premises. And see Note (E).

(E) By s. 48 it is provided, That it shall be lawful for any two or more Justices in the cities of Sydney, Newcastle, or Melbourne, or in any police district, in Petty Sessions assembled, (if they shall see fit), on one week's notice of such application being posted up outside the police offices in such cities and districts respectively, upon the payment to the Colonial Treasurer of Ten pounds, (in addition to the sum hereinbefore required to be paid for his or her license, and the sum of Ten pounds hereinbefore required to be paid for permission to keep a billiard-table), to dispense with any part of the restrictions and prohibitions of this present provision, so far as may regard any licensed house within such cities and districts respectively, for the whole year; but which said authority it shall be lawful for the said Justices to revoke whenever they shall see fit, by causing a notice to that effect, signed by such Justices in Petty Sessions assembled, to be served upon the person to whom the said authority shall have been given.

S. Id., s. 50. [Two Justices].—(13) Any person licensed under this Act knowingly permitting any body, union, society, or assembly of persons declared to be illegal or prohibited by law, or any body, union, society, or assembly of persons who shall require from persons about to be admitted or being admitted thereto, or into the said body, union, society, or assembly, any oath, test, solemn declaration, or affirmation not expressly allowed and required by law; or who shall observe, on the admission of members, or on any other proceeding, any religious or other solemn mystery, rite, or ceremony, or seeming or pretended religious or other solemn rite or ceremony, not sanctioned by law; or who shall wear, bear, or display, on occasions of their meeting or assembling together, any arms, flags, colours, symbols, decorations, or emblems whatsoever,—to meet or assemble, or hold a meeting or assembly, on any occasion or pretence whatsoever, in the house, premises, or other place of sale of the person so licensed; or on any occasion or pretence whatsoever hanging out or displaying, or suffering to be hung out or displayed, on, from, or out of such house, premises, or other place of sale, any sign, flag, symbol, decoration, or emblem whatsoever, except the known and accustomed sign of such house or other place of sale, usually affixed thereto in the way of business.

P. Fine not exc. £5: to be recovered as offence (1); on subsequent conviction, license immediately to become null and void to all intents and purposes, and holder to be incapable of obtaining any future license.

N.B.—*Nothing herein contained shall extend to any meeting consisting exclusively of "Freemasons" or "Odd Fellows."*

S. Id., s. 51. [Two Justices].—(14) Any persons found met or assembled in any such licensed house, &c., along with, or as members of, or belonging to, any such body, &c., (*see last offence*), and neglecting or refusing to remove from or quit such house, &c., when required by any Justice, or any Chief or other constable authorized for the purpose in writing by such Justice, or forcibly resisting such Justice or constable, or refusing to state his name and place of abode, or not truly stating the same. (F)

P. Fine not exc. £2; or, in default of payment, impr. for not exc. 1 mth.

N.B.—*Any constable may apprehend any such person not so removing from and quitting such house, &c., when so required by such Justice or constable authorized, &c., or forcibly resisting the same, and convey him before any Justice of the district, to be dealt with according to law.*

S. Id., s. 52. [Two Justices].—(15) Any licensed person keeping

(F) By s. 51. Any Justice, or any Chief or other constable authorized for the purpose, in writing, by any such Justice, may enter into any such licensed house, &c., in which such Justice shall, from information on oath or otherwise, have reason to believe or suspect that any such body, &c., is met or held, or on or from which any such sign, &c., shall be hung out or displayed, and remove from and put out of such house, &c., any persons found met or assembled therein with or as members of or belonging to any such body, &c., and remove and take away and destroy (if he shall think proper) any arms, banners, &c., found on or with such persons, or hanging out or displayed on or from such house, &c., and may require every such person so found to state truly to him his name and place of abode, and require the immediate inspection of, and take possession of, any book of proceedings or other book used at such meeting, or brought thereto, and detain such book for such time as he may think proper, not exceeding fourteen days.

open his house, in case of riot or tumult, at or after any hour at which two Justices shall have ordered such house to be closed. See "*Riot*," *post*.

P. Fine not exc. £10: to be recovered as offence (1).

S. Id., s. 53. [*Two Justices*].—(16) Any person delaying admittance for such time as shall make it appear that wilful delay was intended, to any Justice, or Chief Constable, Inspector, or Serjeant of police, together with his assistants, demanding entrance from time to time into any licensed house; or to any constable specially authorized in writing by any one Justice, in any particular instance, demanding entrance into any licensed house, or its appurtenances, at any time by day or night.

P. Fine not exc. £10: to be recovered as offence (1).

N.B.—*If admittance be refused or wilfully delayed, force may be employed by such persons to serve process, or for any other lawful purpose.*

S. Id., s. 54. [*Two Justices*].—(17) Any person holding any license under this Act, failing to produce his license to any Justice of the Peace, on demand at his licensed house or place wherein or whereat such license shall be exercised.

P. Fine not exc. £10: to be recovered as offence (1).

S. Id., s. 55. [*Two Justices*].—(18) Any licensed person employing any unlicensed person to sell or dispose of, by retail, any such liquors as aforesaid, in any house, cart, carriage, vessel, or boat, or any place whatever out of the house or place in which such licensed person is authorized to sell or dispose of the same by virtue of his license, or in such house or place, if otherwise than as the servant or agent under the immediate superintendence and control of such licensed person.

P. Fine not exc. £20: to be recovered as offence (1). See Note (E), and *ex parte Ward*,—March, 1855, (Part III).

S. Id., s. 56. [*Two Justices*].—(19) Any licensed person selling, or disposing of, or offering for sale, any fermented or spirituous liquor, or any mixed liquor, part of which is fermented or spirituous, which shall be adulterated or mixed with any deleterious ingredients whatever.

P. Fine £50—£10: to be recovered as offence (1). And see 19 Vic., No. 19.

N.B.—*In order to analyze such liquor, any Justice, on any complaint on oath thereof made to him, sufficient, in his opinion, to cause reasonable suspicion that any such liquor is so adulterated, may authorize the seizure of such suspected liquor, and cause the same to be analyzed by some chemist or other competent person. (S. 56.)*

S. 19 Vic., No. 19, s. 2. [*Two Justices*].—(20) Any dealer in spirituous or fermented liquors, licensed publican, or any other person, knowingly having in his possession any spirituous or fermented liquors so adulterated as aforesaid;—or any such dealer or publican knowingly having in his possession otherwise than for a lawful purpose, any poisonous, deleterious, or pernicious substance.

P. Fine not exc. £100: to be recovered either by distress, (11 & 12 Vic., c. 43, s. 19), or according to 5 W. IV., No. 22; see "*Justices*," No. 2, p. 243. All fermented or spirituous liquors so adulterated as aforesaid, and all poisonous, deleterious, or pernicious substances found in the possession of any such dealer or publican, shall and may be seized by any Inspector of Distilleries, Officer of Customs, or by any constable acting

acquired, selling to any prohibited person any spirituous or fermented liquor.

P. Fine not exc. £10: to be recovered as offence (1).

N.B.—*The Justices of Petty Sessions, or any two of them, shall, from year to year, renew any such prohibition to all such persons as have not in their opinion reformed within the year.* (S. 64).

S. *Id.*, s. 65. [*Two Justices*].—(27) Any person, with a knowledge of the Justice's prohibition, (s. 63, Note (g), giving, selling, purchasing, or procuring for or on behalf of such prohibited person, or for his or her use, any such spirituous or fermented liquors.

P. Fine not exc. £5: to be recovered as offence (1).

S. *Id.*, s. 66. [*Two Justices*].—(28) Any person not holding a license (H) which authorizes such sale, selling (Note c) or retailing any fermented or spirituous or mixed liquors in any unlicensed house or place.

P. See Note (1), and 17 Vic., No. 6, s. 3.

S. *Id.*, s. 67. [*One Justice*].—(29) Any person, not licensed or authorized to sell, carrying about for or exposing to sale such liquors in any street, road, or footpath, or in any booth, tent, store, or shed, or in any boat or vessel, or any other place whatever.

P. Fine not exc. £50: to be recovered according to the provisions of

(H) *Onus of proving License on Defendant*.—In all proceedings against any person for selling or permitting to be sold any fermented or spirituous liquors, or mixed liquors, part whereof is fermented or spirituous, without a license, such person shall, for all purposes connected with those proceedings, be deemed and taken to be unlicensed, unless he or she shall, at the hearing, produce his or her license before and exhibit the same to the sitting Justices or Justice, or shall then and there produce other proof which shall be satisfactory to such Justices or Justice, and which they or he shall, in their or his discretion, choose to receive, of his or her being a licensed person, and of the description of the license held by him or her. (S. 72).

(1) By s. 66, Upon information or complaint upon oath being made before any Justice by any credible person, that he doth suspect and believe that any such liquor or liquors as aforesaid is or are or have been sold or retailed by any person not holding a license authorizing such sale in any particular unlicensed house or place, and such person shall on such information set forth and show reasonable grounds for such belief and suspicion, then and in such case it shall be lawful for such Justice in his discretion to grant his warrant to any constable to enter and search any such house or other place by day; and such constable may break open the doors, if not opened within a reasonable time after demand, and seize all such fermented and spirituous or mixed liquors as aforesaid as he shall then and there find, and the vessel or vessels in which such liquors shall be contained, and shall and may detain the same until the owner thereof shall appear before two or more Justices to claim such liquors, and shall satisfy the said Justices how and for what purpose he became possessed of the same, or, after being summoned, shall fail to appear; and, if it shall appear to the said Justices, after due inquiry and examination, that such liquors were in the said house or other place for the purpose of being illegally sold or disposed of by retail, then such Justices shall adjudge the said liquors and vessel or vessels to be condemned and forfeited, and the same may and shall be sold, and the proceeds thereof, after payment of such costs as may be assessed and awarded by such Justices, shall be applied and distributed in equal moieties to the use of Her Majesty and to or amongst the party or parties so informing; but if otherwise, then such liquors and vessel or vessels shall be forthwith restored to the proper owner on his making application for the same. Any Chief or other constable informing or suing for any penalty under this section is entitled to half thereof. (17 Vic., No. 6, s. 4), and see Note (1).

S. Id., s. 71. [One Justice].—(31) Any person having been summoned by any Justice issuing any summons under this Act, or by any one of the Justices before whom the matter of any information or complaint under this Act may come on to be heard and determined, to appear and give evidence at the hearing of any information or complaint under this Act, and to bring with him and produce at such hearing any necessary documents under his control, specified in such summons, and not attending at the time and place mentioned in his summons without reasonable cause, —or having attended there, and refusing to be sworn, or to affirm, or to answer any legal question put to him, without alleging a sufficient excuse, to be then allowed by the Justice or Justices hearing the case.

P. Fine not exc. £30 : to be recovered as offence (1). See "Witness."

N.B.—*Every summons shall be served by delivering a copy thereof personally to the person summoned, and showing the original at the time of such service, which service shall be at least twenty-four hours before the time specified therein for the attendance of such witness.*

S. Id., s. 74. (M) [One Justice].—(32) Any person being found by any Justice, or any Chief or other constable, drinking in any reputed disorderly house, or in any house, shop, storehouse, or other building, or in any booth, shed, hut, tent, stall, or place in which or where any ale, beer, wine, cider, ginger-beer, spruce-beer, brandy, rum, or other fermented or spirituous liquors shall be sold or disposed of by retail, and the license for such sale not being produced on demand to such Justice or constable.

P. Fine not exc. £5 : to be recovered as offence (1), unless such person shall inform against such unlicensed person, or voluntarily become a witness against him or her in respect of such act of selling or retailing.

N.B.—*Whenever any Justice, or any Chief or other constable, shall find any person so drinking in any such places respectively, and the license for such sale shall not on demand be produced to such Justice or constable, such Justice or constable may apprehend all such persons so found drinking therein.*

S. Id. s. 83. (N) [Two Justices].—(33) Any person obtaining any

to grant a search warrant, as in the case of a suspicion of the unlicensed retailing of spirits as hereinbefore directed, and the same seizure, condemnation, and forfeiture, sale and distribution of proceeds, shall thereupon be authorized as in the case last mentioned, save only that the Justices shall not be bound to inquire as to the purpose for which the said liquors were intended, but solely as to the property or possession aforesaid. Any Chief or other constable suing or informing for any penalty under this section, is entitled to half the penalty. (17 Vic., No. 6, s. 4.)

(M) *Evidence ; Reputation of disorderly Houses.*—In any proceedings against any person charged with unlawfully selling any liquor in a reputed disorderly house, the proof of the reputation of such house, and of any person (not being the owner) found drinking therein, shall be deemed full and sufficient evidence to warrant the conviction of such persons so found drinking in such house, and the proprietors thereof. (S. 75).

(N) *S. 70. Justices may award amends against Informer preferring false complaints.*—Whereas informations or complaints are often laid for the mere sake of gain, and the offences charged in such informations are not further prosecuted, or it appears upon prosecution that there was no sufficient ground for making the charge : in every case in which any information or complaint of any offence shall be laid or made before any Justice or Justices under this Act, and shall not be further prosecuted, or in which, if further prosecuted, it shall appear to the Justice

sum of money or other reward from any person whatever, by threatening directly or indirectly to lodge any information or make any complaint before any Justice or Justices for any offence under this Act, or as an inducement for forbearing to lay such information or make such complaint.

P. Fine not exc. £10 : to be recovered as offence (1).

S. 17 Vic., No. 6, s. 2. [*Two Justices*.]—(34) Any licensed publican permitting music or dancing in any part of his or her licensed house, which is open to public resort, unless by permission in writing of one or more Police Magistrates of the district in which the house is situate ; or, in districts where there may be no Police Magistrate, unless with similar permission from the Justices in Petty Sessions assembled.

P. Fine not exc. £20 : to be recovered as offence (1). See s. 6. of 17 Vic., No. 6, (Note d).

M. 19 Vic., No. 19, s. 1. *Bail comp.*—Any dealer in spirituous or fermented liquors, licensed publican, or other person, putting into or mixing with, or causing to be put into or mixed with, any spirituous or fermented liquors, any poisonous, deleterious, or pernicious substance whatsoever ; or selling or otherwise disposing of, or keeping for sale, any spirituous or fermented liquors so adulterated.

P. Fine not exc. £200 ; or impr. for not exc. 2 yrs., with or without h. l. See *ante*, p. 5, "Adulteration," "Brewer," "Distiller."

QUARANTINE.

(3 W. IV., No. 1 ; 13 Vic., No. 35 ; and 17 Vic., No. 29).

RAILWAY. (o)

S. 22 Vic., No. 19, s. 98. [*Two Justices*.]—(1) *Not fastening Gates*.—Any person omitting to shut and fasten any gate set up at either side of railway for the accommodation of the owners or occupiers of the adjoining lands, as soon as he and the carriages, cattle, or other animals under his care have passed through the same.

P. Fine not exc. £10 : to be recovered either by distress, (s. 19 of 11

or Justices by whom the case shall be heard that there was no sufficient ground for making the charge, the Justice or Justices shall have power to award such amends, not more than the sum of five pounds, to be paid by the informer to the party informed or complained against, for his loss of time and expenses in the matter, as to the Justice or Justices shall seem meet : to be recovered in like manner as any penalty may be recovered under this Act. (S. 70). See "Police," Offence 49, and Note (x), p. 341.

(o) *Interpretation.*—"Railway" extends to any railway or tramway, parts or portions, extension or branch, of any railways or tramways constructed or worked under this Act, and intended for conveyance of passengers or goods in and upon carriages drawn or impelled by engine or other locomotive power.

"Toll" includes any rate or charge, or other payment payable for any passenger, animal, carriage, goods, merchandise, &c., conveyed on the railway.

"Goods" includes things of every kind conveyed on the railway.

"Owner," in cases of notice, means any person or corporation who, under this Act, can sell and convey lands to the Company (*sic*).

tor at such seaport appointed under this Act, the certificate required by said Act.

P. Fine not exc. £30 : recoverable as offence (1).

N.B.—*Such imported sheep, although so infected, if, and so long as, kept in a secure stable or shed approved by such Inspector, shall not be liable to destruction under this Act by reason of such infection, until the expiration of three months after such importation.*

S. *Id.*, s. 14. [Two Justices].—(8) Any person bringing, or causing to be brought, any sheep across the boundary-line into New South Wales from Victoria, without having obtained from some such Inspector a certificate stating that such sheep are not infected with the scab.

P. Fine not exc. 5s. for every sheep so brought: to be recovered as offence (1).

S. *Id.*, s. 16. [Two Justices].—(9) The owner or any other person removing any sheep so that they cannot be viewed by an Inspector, or in any way obstructing such Inspector in the discharge of his duty.

P. Fine not exc. £20 : recoverable as offence (1).

N.B.—Any such Inspector, if he suspect that any sheep are kept on any run contrary to the provisions of this Act, may enter thereon to examine the same: Provided that he first leave a notice, in writing, at the owner's residence twenty-four hours previously, stating his intention so to do; and, if he find any sheep infected with scab, he shall without delay depose to the same, on oath, before the nearest Justice, who may thereupon proceed as directed in sec. 5.

S. *Id.*, s. 17. [Two Justices].—(10) Any shepherd or other person in charge of travelling sheep, (Note 1) refusing to allow such sheep to be examined or destroyed by any Inspector, or in any way obstructing such Inspector in the discharge of his duty.

P. Fine not exc. £5 : to be recovered as offence (1).

S. *Id.*, s. 18. [Two Justices].—(11) Any Inspector refusing, or wilfully neglecting, or unreasonably delaying, to perform any duties imposed on him by this Act, or being guilty of any misconduct in the performance thereof, or wilfully abusing the powers and authority hereby entrusted to him.

P. Fine not exc. £20 : to be recovered as offence (1).

M. *Id.*, s. 8. *Bail comp.*—(1) Any person appointed by any Justice to examine sheep, wilfully making any false report, or delivering a false certificate, to any Justice respecting such sheep.

P. Impr. not exc. 2 yrs., with or without h. l.

M. *Id.*, s. 9. *Bail comp.*—(2) Any person wilfully communicating or causing to be communicated to any sheep the disease called the scab.

P. Impr. not exc. 2 yrs., with or without h. l.

M. *Id.*, s. 17. *Bail comp.*—(3) Any shepherd or other person removing or attempting to remove any sheep detained by any Inspector for the purpose of being destroyed.

P. Impr., with or without h. l., not exc. one year.

SEARCH WARRANT.

See "JUSTICES," "LARCENY," "POLICE," "MANUFACTURES."

SEAMEN.

See "WATER POLICE."

See 19 Vic., No. 8, and *Merchant Shipping Act*, 17 & 18 Vic., c. 104; 17 Vic., No. 36; 16 Vic., No. 25; 15 Vic., No. 12; 13 Vic., No. 28; 11 Vic., No. 46; 11 Vic., No. 23.

SERVANTS.

See "MASTER AND SERVANT."

M. 16 Vic., No. 17, s. 7. *Bail disc.*—(1) Master or mistress of any person, legally liable to provide for such person as an apprentice or servant, necessary food, clothing, or lodging, wilfully and without lawful excuse refusing or neglecting to provide the same.

P. Impr., with or without h. l., for not exc. 3 years.

M. Id. *Bail disc.*—(2) Master or mistress of any such person unlawfully and maliciously assaulting such person, whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently endangered.

P. The same as last offence.

SEWERAGE.

See *The Sydney Sewerage Act*, (17 Vic., No. 34).

SHIPS IN COLONIAL SERVICE, CREWS OF.

See 19 Vic., No. 22.

SLAUGHTER-HOUSES.

See "ABATTOIR," "BUTCHER."

SMUGGLING.

S. 20 Vic., No. 22, s. 8. [*Two Justices*].—*Gold*.—Anyone aiding, assisting, or being concerned in the conveyance of gold for the purpose of being exported contrary to the provisions of this Act, or of 20 Vic., No. 17.

P. Forfeit either treble the value thereof, or £100, at the discretion of the Justices: to be recovered by distress; in default, impr. until payment of penalty, or for not exc. 6 mths. unless penalty and costs be sooner paid. (9 Vic., No. 15, s. 112).

N.B.—*All the gold, together with the boat, &c., is forfeited. S. 7 enacts that anyone shipping, or assisting, aiding, or being concerned in the shipment or carrying of gold for exportation, before due entry of such gold and payment of duty thereon, and due entry outward of such ship, &c., liable to a penalty of treble value, or £100, at election of Collector, &c., of Customs.*

For general law of Smuggling see ss. 82—134 of 9 Vic., No. 15.

SODOMY.

See "ASSAULT."

F. 9 G. IV., c. 31, s. 15. Bail disc.—(1) The abominable crime of buggery, committed either with mankind or with any animal.

P. Death.

F. 1 Vic., c. 87, s. 4. Bail disc.—(2) Accusing, or threatening to accuse, thereof, with a view to extort money, and thereby extorting same.

P. Tr. life—15 yrs.; or impr. not exc. 3 yrs., h. l. and s. c.; or h. l. on roads 15—7 yrs.

See "Accusing," *ante*, p. 3, (where money extorted), and "Letter (Threatening)," *ante*, p. 289.

SOLICITING TO THE COMMISSION OF AN OFFENCE.

M. at Com. Law. Bail comp.—Soliciting to commit a felony or misdemeanor, not afterwards committed.

P. Fine or impr., or both. (*R. v. Higgins*, 2 East, 5; *Dickenson's Q. S.*, 435).

N.B.—*If committed, the offender would be a principal.*

STAGE COACHES.

See "TOLLS," "CARRIAGES (LICENSED)."

M. 1 G. IV., c. 4. Bail comp.—(1) Coachmen wantonly or furiously driving or racing,—or wilfully misconducting themselves, and injuring any person.

P. Fine and impr.

M. 13 Vic., No. 5, s. 1. Bail comp.—(2) If any person shall be maimed or otherwise injured by reason of the careless or furious driving, or of the racing or other wilful misconduct, of any coachman or other person driving any stage coach or other public carriage carrying passengers for hire, such careless or furious driving or racing, or other wilful misconduct of such coachman or other person is a misdemeanor.

P. Fine and impr.

SUBSEQUENT FELONY.

F. 7 & 8 G. IV., c. 28, s. 11. Bail disc.—Any person convicted of any felony, not punishable with death, committed after a previous conviction of felony.

P. Tr. Life—7 yrs.; or impr. not exc. 4 yrs., h. l. and s. c.; or (*if male*) h. l. on roads 15—5 yrs.; (*if female*), impr., with h. or l. l., 7—2 years.

SUICIDE.

M. at Com. Law. Bail comp.—Attempt to commit; (*i. e.*, an attempt to commit a felony).

P. Fine or impr., or both. (4 Bl. C., 189; 1 Russel on C., 307).

SUNDAY.

S. 5 Vic. No. 6, s. 1. [One Justice].—Any person found engaged in

shooting at any pigeon-match, or for pleasure, sport, or profit of any kind whatsoever, on Sunday, or carrying fire-arms on that day. (κ)

P. Fine £5—£2: (L) either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to 5 W. IV., No. 22. See "Justices," No. 2, p. 243.

S. 29 *Car. II.*, c. 7, s. 1. (M) [*One Justice*].—(2) Any person being of the age of 14 years or upwards, tradesman, artificer, workman, labourer, or other person whatsoever, (N) doing or exercising any worldly labour, business, or work of their ordinary calling upon the Lord's Day, or any part thereof,—works of necessity and charity only excepted.

P. Forfeit the sum of 5s.: (O) to be levied by distress; and, in default thereof, to be publicly set in the stocks for 2 hours. (S. 2).

S. *Id.*, s. 1. [*One Justice*].—(3) Any person whatsoever publicly crying, showing forth, or exposing to sale any wares, merchandise, fruit, herbs, goods, or chattels whatsoever upon the Lord's Day, or any part thereof. (P)

P. Forfeit the same.

S. *Id.*, s. 2. [*One Justice*].—(4) *Travelling on*.—Drover, horse-courser, waggoner, butcher, higgler, their or any of their servants, travelling or coming into his or her inn or lodging upon the Lord's Day, or any part thereof.

P. Forfeit 20s.: (Note L) to be levied by distress; and, in default thereof, to be publicly set in the stocks for 2 hours. (S. 2).

S. 1. *Car. I.*, c. 1. [*One Justice*].—(5) *Unlawful Sports on*.—There shall be no concourse of people out of their own parishes on the Lord's Day for any sport or pastimes, or any bull-bailing, bear-baiting, interludes, common plays, or other unlawful exercises and pastimes used by any persons within their own parishes. (Q)

(κ) By s. 2, The penal clause is not to extend to travellers *bona fide* carrying fire-arms for the protection of their lives and property, or the property of their employers, on the public roads of the Colony, or to constables and other persons carrying fire-arms for lawful purposes.

(L) *Recovery of penalty*.—By s. 3, The prosecution must be commenced within 10 days next after the time the offence shall have been committed.

Appeal is allowed.

(M) *Observation*.—An Act, 3 *Car. I.*, c. 1, has been stated to be in force, imposing a penalty of 20s. on carriers, and 6s. 8d. on butchers, for offences on the Lord's Day; but this is not so; for it was (see the end of the Statute, which is in p. 1207 of Callaghan's Acts) "to continue to the end of the first session of the next Parliament," and was not continued.

(N) *What persons within the Act*.—These general words are meant to comprise only persons *ejusdem generis* with those previously mentioned, (*Sandiman v. Breach*, 7 B. & C. 96), but do not include the owner or driver of a stage-coach, as their contracts to carry passengers on Sundays are binding.

(O) *Penalty*.—There can be only one penalty recovered for any number of instances of trading by the same person on the same Sunday. (*Cripps v. Durdan*, Cowp., 640, and Smith's L. C.)

The information under this Act must be laid within ten days after the offence committed. (S. 4).

(P) *Exceptions*.—This provision is not to extend to the prohibition of dressing of meat in families; nor to the dressing or selling meat in inns, cookshops, or victualling-houses, for such as otherwise cannot be provided; nor to the crying and selling milk before 9 a.m., or after 4 p.m., (s. 3). As to bakers or publicans, see "Baker," "Publican."

(Q) The information must be laid within one month after offence was committed.

and make complaint on oath of the facts which require the surety. The complaint is usually in writing.

If the offending party be *present*, he may be required at once to enter into the requisite recognizance. If he be absent, the Justice may make out his warrant to bring the party before him or some other Justice, or he may make it to bring the party before himself only; for he that maketh warrant for the most part hath the best knowledge of the matter, and therefore is the fittest person to do justice in the case. (5 Co., 59).

It seems certain that, if the person to be bound be in the presence of a Justice, he may be immediately committed, unless he offer sureties; and hence it follows *a fortiori* that he may be commanded by word of mouth to find sureties, and committed for disobedience. But it is said that, if he be absent, he cannot be committed without a warrant from some Justice in order to find sureties; and that such warrant ought to be *under seal*, and to show the cause for which it is granted, and at whose suit, and that it may be directed to any indifferent person. (1 Hawk., c. 60, s. 9).

A Justice ought not to commit for not finding surety, until the party has been required and refused to do so.

It is more usual and is considered the better way, except under very special circumstances, for the Justice to bind the party against whom the surety of the peace is required by recognizance "to appear at the next Sessions of the Peace," and in the meantime to keep the peace to the Queen and all her liege people, *especially* to the party claiming the security; (2 Hawk., c. 27); or it may be for a definite period, as six months, a year, &c.

The Justices should fix the amount of the recognizance, having regard to the condition in life of the parties and the circumstances of the case, or as Williams, J., said in *Prickett v. Greatrex*, (8 Q. B., 1020), "The nature of the commitment should at all times bear some relation to the quantity and quality of the offence." It is usual to give the parties bound notice of their recognizance, signed by the Justice. In default of finding surety, the party is committed to the common gaol for the time required, unless in the meantime he enter into recognizance with sureties; but it is not necessary to mention in the commitment the sum for which the sureties are to be bound, though advisable and usual so to do.

The complaint should be verified on oath or affirmation. (16 Vic., No. 1, s. 12. Corroborating affidavits of third persons may be received to support complainant's affidavit. Affidavits in contradiction ought *not* to be received, nor for the purpose of supplying facts said to have been suppressed by the complainant. This is an *ex parte* proceeding; the defendant has no opportunity of obtaining a determination in his favour, and the action of the Magistrate is therefore merely *ministerial*. (*Steward v. Gromett*, 29 L. J. C. P., 170).

A person demanding sureties of the peace swears only to his own apprehensions, of which no other person can form an adequate judgment; from which it has been deduced by the Judges in many cases, as a general rule, that articles of the peace cannot be resisted on any ground, except by showing *direct* evidence of express malice, such as declarations to that effect, but not *inferred* malice collected from general reasoning or collateral circumstances; and moreover that, wherever particular facts of violence

are stated by complainant, it is not permitted that the defendant should controvert them, for they must be taken to be true till negatived through the medium of appropriate prosecution. (Dick. Q. S., 504; 13 E., 171). But see the recent case of *Steward v. Gromett*, 29 L. J. C. P., 170, where this subject is fully discussed.

The Sessions].—The party requiring the surety may at once apply to the Court of Sessions, and this is the most usual and best course when the Court is sitting. The application should be made upon articles verified on oath, showing the facts to warrant it. They should be exhibited on parchment.

It is said that the Sessions cannot in any case proceed against the party for a forfeiture of his recognizance, either in respect of his not appearing, or breaking the peace; but that the recognizance itself, with the record of default of appearance, ought to be removed into the Supreme Court, to proceed by *scire facias* upon such recognizance. (1 Hawk., c. 60, s. 18).

Surety for Good Behaviour].—Surety for good behaviour is nearly the same as surety for the peace. By 34 Ed. III., c. 1, Justices may bind over to good behaviour all persons of evil fame, which being words of comprehensive meaning, the Justice must use his discretion. A Justice cannot use too much caution in demanding *articles for good behaviour*; for, in matters which the law has left indefinite, it is better to *fall short* of than to *exceed* the authority given him by his commission. In a recent case, (*Haylocke v. Sparke*, 22 L. J. M. C., 72), Lord Campbell says:—“Undoubtedly it appears that mere insulting language, though *contra bonos mores*, is not such an offence in respect of which Justices would be authorized in taking security and mainprize; but we have come to the conclusion that cases of aggravated defamation may well require sureties for good behaviour.”

The Statute has always been construed to extend to the prevention of contemplated offences. (*Willes v. Bridger*, 2 B. & A., 287). The same principle applies here as in cases of direct personal danger,—that the Justices would be poor guardians of the public peace if they could not interfere until actual outrage. (*R. v. Stanhope*, 12 A. & E., 621). An examination of the authorities makes it tolerably clear that a manifested intention to disturb the public peace and cause riot and tumult would be a case within the Statute, and the offender might be apprehended for the purpose of taking from him sureties of good behaviour. (*Wise on Riots*, p. 82).

How Recognizance estreated].—By s. 2 of 18 Vic., No. 9, where any recognizance to keep the peace or to be of good behaviour is entered into by any person as principal or surety, before the Court of General or Quarter Sessions of the Peace, or before any Justice or Justices of the Peace, it shall be lawful for any such Court of General or Quarter Sessions of the Peace as aforesaid, upon application made to such Court, to declare such recognizance to be forfeited, upon proof of a conviction of the party bound by such recognizance, of any offence which is, in law, a breach of the condition of the same, and upon further proof that a notice, (s) in writing, signed by the person seeking to put such recognizance in force, has, seven

(s) The required Forms are given in this volume, *post*, Part II.

clear days before the commencement of such Sessions, been personally served upon or left at the usual place of abode of the party, or each of the parties (if more than one), who entered into such recognizance, that an application will be made to the said General or Quarter Sessions that the said recognizance shall be declared forfeited; and if such recognizance shall be declared forfeited, all such proceedings shall be had thereon as in the case of a recognizance forfeited at such Court of General or Quarter Sessions, and all the provisions of the Act of Council passed in the second year of the reign of Her present Majesty, numbered eight, applicable to recognizances forfeited at such Court, shall apply to a recognizance which shall, upon such application and proof as hereinbefore, mentioned, be declared to be forfeited; and, upon notice in writing (see Note s) of such intended application to the said General or Quarter Sessions being given to any Justice or Justices before whom any such recognizance shall have been taken, four clear days before the commencement of the said Sessions, the said Justice or Justices shall transmit the said recognizance to the Clerk of the Peace of the district within which the said recognizance shall have been taken, with a certificate (Note s) that the said recognizance is sent to him by reason of such last-mentioned notice having been so given as aforesaid. See "Recognizance," p. 381.

Surrender of Principal by Bail.—This, it appears, cannot be done in these cases like a recognizance for the party's appearance on a day certain.

SURVEY OF PASTORAL RUNS.

16 Vic., No. 29, s. 1. [*Two Justices*]. Any occupant of Crown Lands who shall have tendered for or demanded a lease of any waste lands of the Crown as a run for pastoral purposes,—or, in his absence, the superintendent or overseer of any such occupant, being resident on or near to such run,—when thereunto required by the surveyor appointed or authorized by the Government to survey such run, or to mark or describe the boundaries thereof, refusing or neglecting forthwith to point out such boundaries justly and truly to such surveyor, or knowingly or carelessly pointing out boundaries which are not his just and true boundaries, when such surveyor shall, not less than one month previously thereto, have sent by post or otherwise letters addressed to such occupier and to the occupants of conterminous runs, or to their respective overseers, stating the time at or about which he will require their mutual boundaries to be pointed out.

P. Fine not ex. £50: to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to 5 W. IV., No. 22). See "Justices," No. 2, p. 243.

SURVEY MARKS PREVENTION.

16 Vic., No. 15, s. 1. (τ) [*Two Justices*].—(1) Every person making or using the official distinguishing survey mark (in the form of a broad arrow), in marking any boundary, or so as to appear to indicate a

(τ) Nothing herein contained shall render the owner or occupier of any land liable to any penalty for the removal of any tree thereon so marked, which he may desire to remove in fencing, clearing, or otherwise improving such land. (S. 2).

boundary, of any land, except in the conduct of an authorized official survey.

P. Fine not exc. £10: to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to 5 W. IV., No. 22, (see "Justices," No. 2, p. 243), by any person authorized by the Attorney-General to proceed for the same.

Id., s. 2. [Two Justices].—(2) Any person wilfully obliterating, removing, or defacing any such survey mark as aforesaid, or any land mark or beacon which shall have been erected by or under the direction of an officer of the Survey Department, or by a surveyor licensed by the Government.

P. Fine not exc. £10: to be recovered as offence (1).

N.B.—The penalty for removal does not apply where the owner or occupier desires to remove in fencing, clearing, or otherwise improving such land.

SWEARING.

19 Geo. II., c. 21, s. 1 (v). [One Justice].—(1) Any person profanely cursing and swearing, (w) *i. e.*, any day labourer, common soldier, common sailor, or common seaman.

[MEM.—By s. 14 of the Act, it was enacted that the sum of 1s. and no more was to be taken for the information, summons, and conviction under the Act

P. Fine 1s., (s. 1), and costs, over and above all charges of the information; in default of immediate payment, or giving security to the satisfaction of the Justice, &c., impr. with h. l. for 10 days, (s. 4); and in default of not paying the charges, &c., immediately, or giving security, &c., impr. with h. l. for 6 days over and above such 10 days, (s. 10); (2nd offence), double the sum first forfeited, (s. 1); (3rd or subsequent offence), treble, &c. (S. 1).

Id. [One Justice].—(2) Any other person under the degree of a gentleman.

P. Fine 2s., (s. 1), with costs; in default, impr., &c., as offence (1); (2nd offence), double the sum first forfeited; (subsequent offence), treble, &c.

Id. [One Justice].—(3) Any person of or above the degree of a gentleman.

P. Fine 5s., (s. 1), with costs; in default, impr. as offence (1); (2nd offence), double the sum first forfeited; (subsequent offence), treble, &c.

TAMPERING WITH A WITNESS.

M. at Com. Law. Bail comp.—Tampering with a witness.

P. Fine or impr., or both. (1 Hawk., c. 85, s. 7).

(v) Informations under this Statute must be laid on oath, and within eight days of the offence. (S. 12).

(w) *Conviction on or after Apprehension*.—If the cursing or swearing be in the presence of a Justice, he may convict the party without further proof; (s. 2); if in the presence of a constable, he may apprehend the party without warrant, and carry him before a Justice in order that he may be convicted, (s. 3), and the Justices to take an information upon oath of the offence having been committed. (S. 4). If any Justice, &c., wilfully and wittingly omit the performance of his duty in the execution of the Act, he shall forfeit £5: to be recovered by action. (S. 6).

TENANT.

TENANT.

(17 Vic., No. 10, s 2). (x)

Possession of Tenements to be summarily recovered].—When the term or interest of the tenant of any land held by him for any term of years, or for any less estate or interest, either with or without being liable to the payment of any rent, shall have expired by effluxion of time, or shall have been determined by notice to quit or demand of possession, and such tenant, or any person claiming under him who shall actually occupy such land or any part thereof, shall neglect to quit and deliver up possession of such land or of such part thereof respectively, it shall be lawful for the landlord of such land, or his agent, to exhibit his information before any Justice of the Peace, and such Justice shall thereupon issue a summons, and, if required so to do, a duplicate thereof, under his hand, against the person so neglecting to quit and deliver up possession, requiring such person to appear before any two or more Justices of the Peace at the place where the Petty Sessions of the district in which the land of which possession is sought to be recovered shall be situated shall usually sit, to show cause why such landlord should not be put into possession of such lands; and if, at the time and place appointed in and by such summons, or at any adjournment thereof, (whether the tenant or occupier shall or shall not appear,) such landlord or such agent shall give due proof according to law, to the satisfaction of the Justices before whom the matter shall be heard, or the majority of them, of the creation and of the expiration or determination in manner aforesaid of the tenancy, and that such landlord then has, and had at the time of the service of the summons upon the tenant or occupier, lawful right as against such tenant or occupier to the possession of such land, and that the tenant or occupier against whom such summons shall be issued was the tenant in possession or the actual occupier of such land at the time of the service of such summons,—then (upon proof of the service of the summons in case the tenant or occupier shall not appear) it shall be lawful for the said Justices, or the majority of them, unless reasonable cause shall be shown or shall appear to them to the contrary, to adjudge the landlord by or for or on whose behalf such information shall be exhibited, entitled to possession of such land, and to award to the said landlord, or to such agent by whom such information shall be exhibited, his costs, to be assessed by the said Justices, or the majority of them, and to issue a warrant under their hands, directed to the constables and peace officers of or acting in or for the district or place within which such land shall be situate, or to any of them, or to any other person or persons as a special bailiff or special bailiffs in that behalf, requiring or authorizing him or them, within a period to be therein named, not less than seven nor more than thirty clear days from the date of such warrant, to enter (by force, if needful) into such land, and to give possession of the same to such landlord, or to such agent on his behalf; and such warrant shall be a sufficient authority to such constables, peace-officers, bailiff, or bailiffs to enter upon such land, with such assistants as he or they shall deem necessary, and to give possession accordingly: Pro-

at the time when the adjudication in respect thereof shall be made, offer to give security to defend an action of ejectment or other appropriate action against him for recovery of possession of the land in respect of which such adjudication shall be made, in the Supreme Court of the said Colony, or any other Court having competent jurisdiction in that behalf, to be brought by or on behalf of the landlord by, or for, or on whose behalf the information upon which such adjudication shall be made shall have been exhibited, then the execution of such warrant and all other proceedings under such adjudication shall be suspended for three clear days, and if during that interval such tenant or occupier shall give security by a joint and several bond of two other responsible persons, to be approved of by the Justices by whom the matter of such information shall be heard, or the majority of them, in such sum of money as to them (regard being had to the value of such land, and to the probable cost of such action, and the probable length of time which must elapse before the same can be determined) shall seem reasonable and they shall direct, to such landlord, his executors and administrators, conditioned to be void (in case such landlord, his heirs, executors, or administrators, shall succeed in such action) upon payment of all such costs of suit as shall be awarded to or recovered by such landlord, his heirs, executors, or administrators, in such action, and of all mesne profits of the said land accruing between the time of such adjudication and the time when such landlord, his heirs, executors, or administrators, shall obtain possession of such land by virtue of such action, and of all such costs as shall or may be awarded by such Justices, or the majority of them, to be paid by such tenant or occupier to such landlord or his agent, then and in such case such warrant shall not be executed or put in force, but shall become and be void, and no further proceeding shall be taken under or in pursuance of such adjudication for recovery of such last mentioned costs or otherwise. (S. 5).

Bond to be Approved.—Every such bond as hereinbefore mentioned shall be approved of, and certified as so approved of, by the Justices by whom the matter of such information shall be heard, or the majority of them, by a memorandum in writing, signed by them, which memorandum shall be on or annexed to such bond: Provided always, that the Court in which any such action of ejectment or other action for the recovery of the land in respect of which such adjudication shall have been made, or any Judge of such Court, may, upon application of the parties bound thereby, or either of them, their or either of their heirs, executors, or administrators, in a summary way, give such relief to the person or persons making such application, or make such other order in the premises as may be agreeable to justice; and every rule or order made by such Court or Judge thereupon shall have the nature and effect of a defeasance to such bond: Provided also, that if any unreasonable delay shall occur in the bringing or prosecuting such action of ejectment or other action for recovery of such land, then the Court in which such action shall be brought, or any Judge thereof, or in case no such action shall have been brought and be depending, then any Court having competent jurisdiction to entertain any such action, or any Judge of any such Court, may, upon application of the parties bound by any such bond, or either of them, their or either of their heirs, executors, or administrators, in a summary way, order or direct

taken to extend to any other number of persons and things and to both sexes. (S. 10).

Procedure.—No person shall be imprisoned for non-payment of any costs awarded under the provisions hereof, but otherwise the procedure shall be according to Jervis's Act, (14 Vic., No. 43). Any person aggrieved by any order, adjudication, or warrant made or issued under this Act, shall have the power to apply for a prohibition, &c., to the Supreme Court, or any Judge there, as if such order, adjudication, and warrant were a summary conviction or order. (S. 11).

Amendment.—No objection shall be allowed on account of any alleged defect in substance or form in any information, complaint, summons, conviction, or warrant, or any variance between it and the evidence adduced on the part of the claimant; and if such defect or variance appear to the Justices, they may cause the proceedings to be amended upon terms, &c., and may adjourn the case. (S. 12). Forms are given in the Schedule of the Act.

THEATRES (LICENSED).

S. 14 Vic., No. 23, s. 2. [*Two Justices*].—(1) Any person acting, representing, or performing, or causing to be acted, represented, or performed, for hire, gain, or reward, any interlude, tragedy, opera, comedy, stage-play, farce, burletta, melo-drama, pantomime, or any stage-dancing, tumbling, or horsemanship, or any other entertainment of the stage whatever, to which admission shall or may be procured by tickets or payment of money, or by any other means, &c., as the price of admission; or taking or receiving, or causing to be taken or received, any money, goods, &c., by way of rent, &c., for the use of any house, &c., wherein such entertainments shall be acted, &c.; or being the owner or occupier thereof, and knowingly permitting the same to be so used, &c., in case the place wherein the same shall be acted, &c., be without the written authority or license of the Colonial Secretary.

P. Fine not exc. £50: to be recovered either by distress under s. 19 of Jervis's Act, or according to the procedure of 5 W. IV., No. 22. See "*Justices*," No. 2, p. 243.

S. *Id.*, s. 5. [*Two Justices*].—(2) Any person, for hire, acting or presenting, or causing to be acted or presented, any stage-play or other entertainment as aforesaid; or any act, scene, or part thereof; or any prologue or epilogue, or part thereof, contrary to the express prohibition, in writing, of the Colonial Secretary. (z)

P. Fine not exc. £50: to be recovered as offence (1). The license, *ipso facto*, becomes void.

(z) By s. 3, Every house, room, building, garden, or place wherein such entertainment, &c., shall be acted, &c., unless authorized as aforesaid, shall be deemed a disorderly house, &c.; and any constable authorized by warrant under the hand of a Justice—which may be issued upon complaint, *on oath*, that there is reason to suspect that any house, &c., is used as aforesaid without license—may enter upon the premises, and seize every person found thereon; and every person so found shall be deemed a rogue and vagabond, and is subject to the penalties and punishments consequent thereon. See "*Vagrant*." By s. 4, The burden of proving that such place is licensed lies on the defendant. The prosecution must be within three months of the offence. Appeal is allowed.

TOLLS.

(2 W. IV., No. 12).

Section 3 of 2 W. IV., No. 12, (partly repealed by 20 Vic., No. 38, which equalizes the tolls on drays and waggons), regulates the scale of tolls to be taken at all turnpike gates.

Section 4 provides for tolls on carriages attached to other carriages; and by s. 6, no tolls are to be demanded at two gates within ten miles on the same road. S. 5 is repealed.

By s. 7, the tolls at ferries are regulated.

By sections 8 and 9 certain privileged parties are exempted from paying toll; but see 18 Vic., No. 15.

Section 10 authorizes the Governor to let turnpike and ferry tolls by auction or upon private tender, (s. 12), for a term (not exceeding five years, if let by the Governor—not exceeding two years, if let by Commissioners, under 13 Vic., No. 41; see 14 Vic., No. 5); notice of letting and conditions to be given in the newspapers, &c.; highest bidder to enter into bond, and, in case of default, tolls to be put up again, until a bidder shall be found who will enter into the bond with the sureties required.

By s. 11, Any loss or expenses may be recovered from the defaulter; “and for that purpose it shall be lawful for the Collector of Internal Revenue, or such other person as the Governor shall appoint to let such tolls and dues as aforesaid, to summon such defaulter before two or more Justices of the Peace, to examine into, hear, and determine the matter of such alleged default, and to ascertain, assess, and fix the amount of loss that may have been occasioned thereby, and all expenses attending the same, and to levy the amount thereof, if any, by warrant under their hands and seals upon the goods and chattels of such defaulter.”

Section 13 provides that after sale or acceptance of tender, and the bond being entered into, tolls shall be leased by deed in the form annexed to the Act.

Section 14 provides as to the nature and form of the bond to be entered into by the lessee; the Form is given in the Schedule of the Act.

Section 15 empowers the Governor in certain cases to appoint collectors of tolls, who are to possess the same powers and liabilities as lessees, and to execute bonds, &c.

By s. 16, In case of non-payment of rent, or breach of conditions, or the lease becoming void, and the lessee refusing to give up possession, any Justice may, upon complaint upon oath, by warrant under his hand and seal, order a constable, &c., to enter upon and take possession of any toll-house, &c., and to remove and put out such lessee, &c.; and the tolls, &c., may be relet, and may in the meantime be collected and received under an authority from such Justice for the benefit of Her Majesty.

By s. 17, In case the lessee, on the expiration of his term, refuse to give up possession to succeeding lessee, or person authorized to receive the tolls, &c., of all toll gates, houses, boats, &c., any Justice, upon complaint on oath, by warrant under his hand and seal, may order any constable, &c., with all necessary assistance, to take possession of the same, and to put out such lessee and other person found therein, together with their goods, from the possession thereof; and such lessee shall be liable to

the penalties mentioned in the bond entered into by him, and to make compensation to succeeding lessee for any loss occasioned by him, to be ascertained by any two or more Justices, and levied by distress.

By s. 18, Lessees of tolls are authorized to appoint collectors and other necessary servants, who are to possess same powers as lessees for the recovery of tolls, and for whose conduct the lessees are responsible.

14 Vic., No. 5, authorizes leases of tolls, &c., for extended terms—*i. e.*, five years, if let by Governor; 2 years, if let by Commissioners, under 13 Vic., No. 41.

17 Vic., No. 16, applies the provisions of 2 W. IV., No. 12, and 13 Vic., No. 41, to the Police District of Maitland, in Northumberland and Durham.

18 Vic., No. 14, applies the same provisions to Randwick and Coogee Road Trusts.

18 Vic., No. 23, appoints Commissioners for managing the Public Reservoir of Water at Campbelltown.

11 Vic., No. 49, creates certain Road Trusts in and about Sydney, but is for the most part repeated by 13 Vic., No. 41.

This latter Act creates certain Road Trusts in Cumberland; but by s. 12 of Main Roads Act (21 Vic., No. 8), "all the powers and authorities which by 2 W. IV., No. 12, were vested in the Governor and Collector of Internal Revenues, and all provisions of the said Act, including such portions as were transferred or altered by 13 Vic., No. 41, and 17 Vic., No. 16, and also 14 Vic., No. 5, (so far as it relates to the said three main roads), and also the provisions of 20 Vic., No. 38, shall be transferred, revived, and vested in the said Governor and the Executive Council."

S. 14 Vic., No. 5, s. 8. [*Two Justices*].—(1) Any collector or keeper of tolls, or boatman or ferryman, at any turnpike-gate or ferry established in pursuance of certain Acts, (*see the section*), taking less toll than he is authorized to do.

P. Fine not exc. £20: to be recovered either by distress, (s. 19 of 11 & 12 Vic., No. 43), or according to the procedure of 5 W. IV., No. 22. See "*Justices*," No. 2, p. 243.

N.B.—*It may be remarked that this offence, if committed in Northumberland, &c., is cognizable by one Justice. See 17 Vic., No. 16. Appeal is allowed; one-half of the fines to be appropriated to H. M., one-half to the informer. (Ss. 9, 10).*

S. 20 Vic., No. 38, s. 5. (A) [*One Justice*].—(2) Owner or driver of any waggon, cart, or other carriage, (after being required), refusing to

(A) By s. 3, Every cart, dray, wain, waggon, or other such carriage, *both or all the wheels whereof shall be less than five inches wide in the tire*, shall become and be liable to be charged double toll; and, by s. 4, Every Trustee, Commissioner, lessee, or collector of tolls, &c., is authorized to measure the breadth of the wheels of any waggon, &c., passing along such turnpike-road before the same shall be allowed to pass through any toll-gate, &c. Certain exceptions are provided for by s. 7. By s. 8, All wheels not less than five inches wide shall be cylindrical, that is to say, of the same diameter on the inside as on the outside, so that when such wheels shall move on a flat or level surface, the whole breadth of the wheel shall bear equally on such surface, &c.

permit the wheels of such waggon, &c., to be examined and measured, or turning or driving out of the road in order to avoid or evade the same, or in any way hindering or obstructing the same, or attempting to pass through any toll-gate or bar before such measuring and examination shall have been effected.

P. Fine not exc. £5 : to be recovered as offence (1).

S. *Id.*, s. 6. [*One Justice*].—(3) Collector or deputy, or other person appointed to collect tolls, allowing any such waggon or other carriage to pass his toll-gate or bar before or without such measuring and examination after the same shall have been lawfully required.

P. Fine not exc. £5 : to be recovered as offence (1).

N.B.—*Such waggon, &c., may be prevented passing.* (S. 6).

S. 2 W. IV., No. 12, s. 19. [*One Justice*].—(4) Any lessee or collector of any tolls or ferry-dues neglecting or refusing to put up the required table of tolls or ferry-dues, or to provide tickets to be delivered gratis on payment of toll, or to cause the name of the collector or keeper of such toll for the time being to be put up as required. (b)

P. Fine not exc. £5 ; in default of payment within 3 days, to be levied by distress ; and, for want of such distress, impr. not exc. 3 mths. ; see s. 30 given in full in Note (A), (11 & 12 Vic., c. 43, ss. 19, 21) ; or, by s. 23 of 13 Vic., No. 41, in default of payment of the fine at once, or at the time appointed by the Justice, impr. not exc. 2 mths., if fine less than £5 ; not exc. 3 mths., if fine exceed £5,—to cease upon payment of the sum due. (c) (11 & 12 Vic., c. 43, s. 23).

(b) By s. 19, The lessees, farmers, or collectors of all turnpike-tolls and ferry-dues established under this Act are required, during the whole time that they shall continue such, to put up and continue in some conspicuous place at or near to every turnpike-gate, or at or upon toll-house or ferry-house, within their respective districts, a table painted in distinct, legible, black letters on a board with a white ground, containing at the top thereof the name of the gate or ferry at which the same shall be put up, and a list of all tolls or dues payable thereat, distinguishing severally the amount of tolls and the different sorts of cattle, beasts, carriages, or other vehicles for which they are severally to be paid, where there shall be any variation therein, and a list of the toll-gates (if any) wholly or partially cleared by the payment of toll at the gate or bar where such table shall be fixed ; and the said lessees, &c., shall provide tickets denoting the payment of toll, and on every such ticket shall be specified the name of the gate at which the same shall be issued, and the names of the gates (if any) freed by payment of toll thereat ; and the said lessees, &c., shall cause to be placed, by themselves or their collectors or servants, on some conspicuous place near to such board, the Christian and surname of the collector or keeper of the tolls who shall be on duty for the time being, and shall continue the same during the time he shall be on duty, and change the same on every change that may take place in such collector, &c., on duty, to the names of the collector, &c., that may succeed, as often as such change may take place ; and, by s. 20, If any person liable to pay toll, after demand, refuse to pay, the collector may shut and fasten the gates, fences, chains, &c., of the turnpike-gate or ferry-boat, and keep the same so shut, &c., till the said toll, &c., is paid by the person refusing, &c.

(c) *Recovery of Fines.*—Any one or more Justices may determine all offences against this Act, and may summon before them any parties accused of offending against this Act ; and if the accused shall not appear on such summons, or offer reasonable excuse for default, such Justices are hereby authorized and required to make inquiry touching the complaint, and examine witnesses on oath, and to convict or acquit the accused ; and in case of conviction, if the penalty be not paid within three days after conviction, such Justices shall thereupon issue a

N.B.—*The conviction must be within 3 months from the commission of the offence.*

S. Id. [One Justice].—(5) Any collector or keeper of tolls, or boatman or ferryman, not being in attendance at all times, by day and night, at the place at which he is stationed or ought to be; or demanding and taking a greater toll from any person than authorized to do; or demanding and taking a toll from any person exempt from payment and claiming exemption; or, under colour of his office as collector, &c., wilfully extorting from any person any sum of money or thing of any value as and for or in lieu of toll; or refusing to permit any person to read, or in any manner hindering any person from reading, the inscription on the boards or the names fixed up as required; or refusing to tell his Christian and surname, or giving a false name, to any person demanding the same, on being paid toll; or refusing or omitting to give gratis to the person paying toll, or on his demanding the same, a ticket (Note B) denoting the payment of the toll so paid; or, upon the legal toll being tendered or paid, unnecessarily detaining, or wilfully obstructing, hindering, or delaying, any passenger from passing through any turnpike or toll-gate or bar, or over any ferry; or making use of scurrilous or abusive language to any traveller or passenger.

P. Fine not exc. £5: to be recovered as offence (4).

S. 2 W. IV., No. 12, s. 21. [One Justice].—(6) Any person with any horse, beast, or carriage, going off or passing from any turnpike-road through or over any land adjoining thereto, not being a public highway, with intent to evade payment of any toll; or any person giving or receiving from any person other than a collector of tolls, or forging, counterfeiting, or altering, any note or ticket, with intent to evade payment of any toll or part thereof; or any person fraudulently or forcibly passing through any toll-gate with any beast or carriage, or leaving on the said road any beast or carriage, by reason whereof the payment of any toll shall be avoided or lessened; or taking off, or causing to be taken off, any beast from any carriage either before or after having passed through any toll-gate, or, having passed through the same, and afterwards putting any beast to any carriage, and drawing therewith upon any turnpike-road, so as to increase the number of beasts drawing said carriage after the same shall have

warrant to distrain the goods and chattels of the offenders for such penalty, and the costs of the prosecution and distress; and if, within five days from the distress being taken, the penalty and costs be not paid, the goods seized shall be appraised and sold, rendering the overplus, after deducting the penalty and costs of prosecution, distress, and sale, to the owners, which costs and charges shall be ascertained by the convicting Justices; and for want of such distress, such offenders shall be committed to the common goal for any period not exceeding three mths.: Provided that no person shall be convicted of any offence contrary to this Act, after three months from the time when such offence was committed. Section 31 allows an appeal to the next Quarter Sessions; and execution of the judgment is thereby suspended, in case the person convicted shall, with two sufficient sureties, enter into recognizance in a sum equal to double the penalty; or, in case such conviction shall contain a judgment of imprisonment, the appellant shall immediately enter into a recognizance, himself in the sum of £20, and two sureties in £10 a-piece, such recognizance to be conditioned to prosecute the appeal, &c. Section 34, as to the appropriation of fines, is repealed by 15 Vic., No. 16.

passed through said gate, whereby the payment of any toll may be lessened; or doing any other act with intent to evade payment of any toll, and whereby the same shall be evaded.

P. Fine not exc. £5: to be recovered as offence (4).

S. Id., s. 27. [One Justice].—(7) Any person, except the lessees and collectors appointed under this Act, and their boat or ferry-man and servants, using, hiring, or employing on hire, or for any fee, pay, or reward, any boat, punt, or other vessel for the carrying, transporting, or conveying across or over any river or creek within the Colony, whereon any ferry may be established under this Act, and within one mile of any such ferry, any passengers, beasts, carts, or carriages.

P. Fine not exc. 20s.,—to be recovered as offence (4),—on each person so hiring, and on each person using or employing, any such boat, &c., and for each person or beast, &c., conveyed across within the prohibited distance.

N.B.—Except when done in time of flood or fire or in pursuit of felons, or in other emergency. Nothing in this section shall prevent any person, horse, cart, or carriage from fording any river near to any ferry-boat or punt.

S. Id., s. 24. [One Justice].—(8) Any person wilfully pulling down, breaking, injuring, or damaging any table of tolls or ferry-dues put up at any toll or ferry-house or turnpike-gate, or wilfully or designedly defacing or obliterating any inscription, letter, figure, or mark thereon; or wilfully pulling up, throwing down, cutting, breaking, injuring, damaging, or destroying any post, rail, or fence placed by the side of any road, or near any pit or quarry which shall be used or opened for getting stone, gravel, &c., for making or repairing roads or bridges; or wilfully causing any damage or injury to be done to any bridge, or any arch, wall, abutment, prop, or fence belonging thereto, erected in any public highway or by the side thereof; or wilfully damaging or injuring, or cutting, breaking, or otherwise destroying any mile-post or mile-stone erected by the side of any highway, or casting or throwing any earth or rubbish, or other matter or thing, into any drain, ditch, culvert, trench, or other water-course under or by the side of any highway, so as to obstruct the clear running off of any water, &c., from the highway; or, without being authorized by a Government Surveyor or other proper authority, shovelling, raking, gathering, or heaping up, or carrying away, any stones, gravel, sand, or other material, slutch, dirt, mire, drift, or soil from any highway or the side thereof, or any footpath or causeway belonging thereto; or putting up any erection, building, or fence on or at the side of any highway or turnpike-road, so as to reduce its breadth; or making, or causing to be made, any dwelling-house or other building, or any hedge or fence, on the side of any highway or turnpike-road, within forty-five feet, if within three miles of any town, or, if beyond that distance, within forty feet, from the centre thereof; or making, or causing to be made, any ditch, gutter, drain, or watercourse upon or across, or otherwise breaking up or injuring, the surface of such road, or any part thereof; or making any bonfires, or wantonly letting-off or throwing any lighted squib, rocket, or fire-work within one hundred yards of any public road; or racing any horse, ass, mule, or other beast, or baiting any bull or other beast, or playing at any game

or exercise that may cause any riot, mob, or tumultuous meeting upon such road, or the side thereof; or, by fighting or otherwise, collecting any mob, to the annoyance of any traveller upon such road; or any person wilfully preventing any other person from passing him, or any carriage under his care, on any such road; or digging or using any pit for sawing timber, or for other purpose, within forty-five feet from the centre of any highway, unless enclosed by a secure fence.

P. Fine not exc. £2, over and above damages: to be recovered as offence (4), (s. 30); and see 13 Vic., No. 41, s. 22.

S. Id., s. 26. [One Justice].—(9) Any owner or proprietor of any coach, post-chaise, or other carriage let to hire, and also of any waggon, cart, or wain, using or allowing the same to be used on any turnpike-road, without the name or description painted thereon as required, or causing to be painted thereon any false or fictitious name or place of abode, or house, or farm. (D)

P. Fine not exc. 40s.: to be recovered as offence (4).

S. Id., s. 27. [One Justice].—(10) Any person hauling or drawing, or causing to be hauled, &c., on any highway or turnpike-road, any timber, stone, or other thing otherwise than on wheeled carriages, or suffering any timber, &c., carried principally or in part on wheeled carriages, to drag or to trail on such road, to the prejudice thereof; or leaving any waggon, wain, cart, or other carriage on such road or the side thereof, without any proper person in sole custody or care thereof, longer than necessary to load or unload the same, except in cases of accident, and in such cases longer than necessary to remove the same; or neglecting to place such waggon, &c., during the time of loading or unloading, or of taking refreshment, as near to one side of the road as conveniently may be, either with or without any horse or beast of draught harnessed or yoked thereto; or laying any timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing whatsoever, on such road, or the side thereof, or the footpaths or causeways adjoining, to the prejudice of such road, &c., or to the prejudice or annoyance, or interruption, or personal danger of any person travelling thereon; or suffering any water, filth, dirt, or other offensive matter or thing to flow into or on such road or footpaths from any house, building, erection, lands, or premises adjacent thereto; or driving any pigs or swine on such road, and suffering them to root up or damage the same, or the fences, hedges, banks, or copse on either side thereof; or, after having blocked or stopped any cart, waggon, or other carriage in going up or down a hill, causing to remain on such road the stone, timber, &c., used for blocking, &c.; or pulling down, damaging, injuring, or destroying any

(D) By s. 26, The owner or principal proprietor of every coach, post-chaise, or other carriage let to hire, and also of every waggon, wain, or cart, shall cause to be painted on the doors of all such coaches, &c., and on some conspicuous part on the right or off side or off shaft of every such waggon, &c., before the same shall be used on any turnpike-road, his Christian and surname, and place of abode, or of the house or farm where the same is generally kept, in legible letters, not less than one inch in height, and continue the same thereon so long as such coach, &c., shall be so used; and the owner of every common stage-waggon or cart employed in travelling stages from town to town, shall cause to be painted over his Christian and surname the words "common stage waggon," or "cart," as the case may be.

lamp or lamp-post put up, &c., in or near to the side of such road, or toll-house erected thereon, or extinguishing the light thereof.

P. Fine not exc. 40s., over and above the damages: to be recovered as offence (4).

N.B.—*One moiety of the fine to go to the informer, the other to H. M.*

S. *Id.*, s. 28. [*One Justice*].—(11) Any person erecting, or causing to be erected, any windmill within two hundred yards from any part of any highway or turnpike-road.

P. Fine £5 for every day such windmill shall continue: to be recovered as offence (4).

N.B.—*Nothing herein shall render legal the re-erection or continuance of any windmill where by the Common Law such shall be a nuisance.*

S. *Id.*, s. 29. [*One Justice*].—(12) The driver of any waggon, wain, cart, or dray riding on any such carriage on any turnpike-road, not having some other person on foot or horseback to guide the same, (such light carts as are usually driven with reins, and conducted by some person holding the reins of the horses, not being more than two drawing the same, excepted); or the driver of any carriage on any such road, by driving furiously, or by negligence or wilful misbehaviour, causing any hurt or damage to any person or carriage on such road, or quitting the said road and going on the other side of the fence enclosing the same, or wilfully being at such a distance from such carriage, or in such a situation, whilst passing on such road that he cannot direct or govern the horses or the cattle drawing the same; or the driver of any waggon, &c., meeting any other carriage, and not keeping his waggon, &c., on the left or near side of the road; or any person wilfully preventing any other person from passing him or any carriage under his care on such road, or, by negligence or misbehaviour, preventing or interrupting the free passage of any carriages, or of any of H. M.'s subjects therein.

P. Fine not exc. 40s., by such driver; or, in default, impr. not exc. 1 month, unless sooner paid. (11 & 12 Vic., c. 43, s. 22).

N.B.—*Every driver so offending may be apprehended by any person without warrant; and*

If any such driver refuse to discover his name in any of aforesaid cases, the Justice before whom he shall be taken, or to whom complaint shall be made, may commit him to the House of Correction for any time not exceeding one month, or proceed against him for the penalty aforesaid by a description of his person and offence only, without adding any name or designation, but expressing in the proceedings that he refused to discover his name.

M. 2 W. IV., No. 12, s. 23. *Bail comp.*—(1) Any person wilfully or maliciously pulling or cutting down, plucking up, throwing down, breaking, levelling, or otherwise damaging, demolishing, or destroying any toll or turnpike-gate, or chain, post, rail, bar, wall, or fence belonging to any toll or turnpike-gate, or any chain, &c., set up to prevent passengers, or their beasts or carriages, from passing without paying any toll authorized, or any house erected for the use of any toll or turnpike-gate, or any ferry-houses or boat-houses; or wilfully or maliciously sinking, scuttling, running or driving aground, or otherwise damaging, demolishing,

or destroying any punt, boat, or other vessel employed in any ferry, or breaking, severing, cutting, or destroying any mooring chain, rope, or other fastening, or any rail, post, wall, dam, or fence, of or belonging to any such boat, &c., used on any such ferry; or forcibly rescuing any person lawfully in custody of any officer or other person for any offence hereinafter mentioned.

P. Fine or impr., or both.

M. Id., s. 25. (2) Any coachman or other person in charge of any stage coach or public carriage, convicted of wanton and furious driving or racing, or wilful misconduct, whereby any person shall be maimed or otherwise injured.

P. Fine and impr., and see 13 Vic., No. 5, "Carriages Licensed," p. 59.

TRUSTEES AND DIRECTORS.

M. 22 Vic., No. 16, s. 1. (E) Bail comp.—(1) Any trustee of property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, misappropriating or destroying such property, or any part thereof, in any manner, with intent to defraud.

P. H. l. on roads not exc. 5 yrs.; or impr., with or without h. l., not exc. 3 yrs.; or by fine with or without impr.

N.B.—*The particular attention of the Justices is called to s. 13, which directs that no prosecution under this Act shall be instituted in any Court of General or Quarter Sessions.*

And where any civil proceeding is pending in any Court respecting such misappropriation or destruction, no prosecution shall be instituted, or person committed or held to bail, for an offence against the preceding enactment, without the leave of such Court, or some Judge thereof. (S. 2).

M. Id., s. 4. *Bail comp.*—(2) Any person entrusted, by any written instrument, with the sale or transfer of property, misappropriating or destroying such property in any manner, with intent to defraud.

P. The same as offence. (1).

M. Id., s. 6. *Bail comp.*—(3) Any director, public officer, or manager of any body corporate or public company, as such, receiving or possessing himself of any of the property of such body corporate or company, otherwise than in payment of a just debt or demand, or omitting to make a true entry thereof in the books or accounts of such body corporate or company, or to direct such entry to be made, with intent to defraud.

P. The same as offence (1).

(E) By s. 3, "Trustee" shall mean a trustee (whether named or acting alone, or jointly with any other or others), under some express trust created by deed, will, or other instrument in writing, and shall include every person on whom such trust may devolve by operation of law or otherwise, and shall extend to executors and administrators, and assigns in insolvency; and the word "property" shall include every description of real and personal property, money, and securities for money, debts, and legacies, and all deeds and instruments relating to any such property; and not only the original subject of the trust or the property entrusted for safe custody, or for sale or transfer, but also any property into which the same may have been converted, and the proceeds thereof respectively.

As to the Form of Indictment, see s. 14.

M. Id., s. 5. Bail comp.—(4) Any director, public officer, or manager of any body corporate or public company, misappropriating or destroying any of the property of such body corporate or public company, (whether he be a member thereof or not), with intent to defraud.

P. The same as offence (1).

M. Id., s. 7. Bail comp.—(5) Any director, public officer, manager, or member of any body corporate or public company, destroying, mutilating, falsifying, or altering any book, paper, entry, security, or document belonging to such body corporate or company, with intent to defraud; or making, or concurring in making, any false entry, or being guilty of, or concurring in, any material omission in any such book, paper, security, or document.

P. The same as offence (1).

M. Id., s. 8. Bail comp.—(6) Any director, public officer, or manager of any body corporate or public company, making, circulating, or publishing, or concurring in making, circulating, or publishing any written statement or account which he shall know to be false in any material particular, with intent to defraud or deceive any person, or with intent to induce any person to become a shareholder or partner in, or to entrust or advance property to, such body corporate or company, or to enter into any security for the benefit thereof.

P. The same as offence (1).

M. Id., s. 9. Bail comp.—(7) Any person receiving any property fraudulently misappropriated within the meaning of this Act, knowing the same to have been misappropriated.

P. The same as offence (1).

VAGRANT ACT.

It has been thought advisable to add a few introductory remarks on the exercise of the large powers vested in Magistrates by the Vagrant Act.

The Vagrant Act deals with three classes of offenders, namely: first, "idle and disorderly persons;" secondly, "rogues and vagabonds;" and thirdly, "incorrigible rogues."

The Act of Parliament points out what constitutes a person any one of these, and how he is to be dealt with; and, in the great majority of cases, the facts will be too simple to create the slightest difficulty. The offending party will, generally, have been brought up in the custody of some officer, or other person, who has actually caught him in the fact, as by begging in the streets, &c. If, however, the party be not caught in the fact, or on quick pursuit, a summons or warrant ought to be issued as in all other cases.

There are, however, three or four descriptions of persons falling within the terms of the foregoing Statute, whose cases will, at times, require at the hands of the Justices a very careful consideration. By this Statute it is enacted that every common prostitute, wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner, shall be deemed to be an idle and disorderly person, and may be committed to the house of correction, and be there kept to hard labour for any term not exceeding two years. Great caution in investigating a charge of this kind is necessary to ascertain

that the charge is not preferred from vindictive or personal motives. It is an easy thing for a policeman, or anyone else, who may harbour an ill feeling against a female who may be bereft of friends or relatives to protect her, and who may be getting an honest though scanty living by her industry, to denominate her a common prostitute, and to charge her with behaving in an indecent manner. Instances (we believe) have often occurred where innocent but poor and friendless girls, who, after successfully resisting the arts of some libertine, and having been goaded to turn round and denounce him, have been given in charge by their persecutors as prostitutes, under this Statute, and afterwards committed to gaol. The process of preferring and substantiating the charge is so simple, speedy, and inexpensive, and affords so tempting an opportunity for the gratification of bad and malignant passions, that Justices cannot be too guarded when called upon to act in such a case.

Another very frequent charge under this Statute is that under sec. 4, wherein, amongst other descriptions of persons described as rogues and vagabonds, we find set down "every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony." An offence so general in its terms, requiring so few facts to support it, so easily trumped up, and so difficult to be rebutted, requires a very careful investigation at the hands of Justices; it is a charge to which a poor man out of employment, and loitering his time away in the streets for want of something better to do, is peculiarly open.

Now, when it is remembered that, whether or not a party be a bad character, he very probably becomes one after being sent to gaol as a rogue and vagabond,—that his character is very much affected,—that, after such a conviction, it is nearly hopeless for him to endeavour to obtain honest employment,—and that he is almost necessarily thrown back amongst the worst classes, who are the only ones who are ready to receive him, it behoves Justices to pause ere they consign a party to so miserable a fate. It is to be feared that, with many Justices, a conviction under this Statute is thought to be but a very light matter; perhaps they think that a few weeks' imprisonment and hard labour operate as a very wholesome correction for evil propensities; the law certainly points out imprisonment and hard labour as the punishment to be awarded, but there is too much reason for fearing that, whilst few are reformed by such a corrective, very many are made infinitely worse, and ultimately ruined by its infliction. A few kind and admonitory words from the Justice, pointing out the evils which attend upon vicious courses, would frequently exercise a most salutary influence over a man who is yet hesitating upon the brink of crime, when a committal to gaol would render him desperate.—(*Chiefly from Saunders's Manual*).

S. 15 Vic., No. 4, s. 2. (F) [One Justice].—(1) *Idle and disorderly*

(F) *Conviction*.—In *Donoghue v. King*, (August, 1856), a warrant of commitment, alleging that the prisoner had been illegally on the station of complainant,

Persons].—Every person who, having no visible lawful means of support, or insufficient lawful means, shall not—being thereto required by any Justice, or who being duly summoned for such purpose, or who shall be brought before any Justice, in pursuance of the provisions of this Act—give a good account of his or her means of support, to the satisfaction of the Justice;—and every person, (not being an aboriginal native, or the child of any aboriginal native), who, being found lodging or wandering in company with any of the aboriginal natives of this Colony, shall not, being thereto required by any Justice, give a good account to the satisfaction of such Justice, that he or she hath a lawful fixed place of residence in this Colony, and lawful means of support, and that such lodging and wandering hath been for some temporary and lawful occasion only, and hath not continued beyond such occasion;—and every common prostitute wandering in any street or public highway, or being in any place of public resort, who shall behave in a riotous or indecent manner;—and every habitual drunkard, having been thrice convicted of drunkenness within the preceding twelve months, who, in any street or public highway, or being in any place of public resort, shall behave in a riotous or indecent manner;—and the holder of every house which shall be frequented by reputed thieves, or persons who have no visible lawful means of support, and every person found in

and had no fixed place of abode or lawful means of livelihood, was held bad, because it did not negative that the prisoner had given a good account of himself.

Apprehension].—By s. 7. Any person may apprehend any person who shall be found offending against this Act, and forthwith take and convey him or her before some Justice, to be dealt with, &c., or deliver him or her to any constable, &c., to be so taken and conveyed as aforesaid; and in case any constable or other peace officer shall refuse or wilfully neglect to take such offender into his custody, or to take and convey him or her before some Justice, or shall not use his best endeavours to apprehend and convey before some Justice any person that he shall find offending against this Act, it shall be deemed a neglect of duty in such constable or other peace officer, and he shall, on conviction, be punished in such manner as is hereinafter directed. (See s. 12, Offence 6).

By s. 8. Any Justice may grant a warrant to apprehend any offender against the Act, upon oath of the commission or suspected commission of any offence against this Act.

By s. 9. Any constable or other person apprehending any person charged with being an idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue, may take any horse or other cattle, or any vehicle or goods, in the possession or use of such person, and may take and convey the same, as well as such person, before a Justice; and every Justice by whom any person shall be adjudged to be an idle and disorderly person, rogue, and vagabond, or an incorrigible rogue, may order that such offender shall be searched, and that his or her trunks, boxes, bundles, parcels, or packages shall be inspected in the presence of such Justice, and of him or her, and also, that any cart or other vehicle which may have been found in his or her possession or use shall be searched in his or her presence; and the said Justice may order that any money which may be then found with or upon such offender shall be paid and applied for and towards the expense of apprehending and conveying to the gaol or house of correction, and maintaining such offender during the time for which he or she shall have been committed; and if, upon such search, money sufficient for the purposes aforesaid be not found, such Justice may order that a part, or, if necessary, the whole of such other effects then found shall be sold, and that the produce of such sale shall be paid and applied as aforesaid, and also that the overplus of such money or effects, after deducting the charges for such sale, shall be returned to the said offender. (S. 9).

As to the form of conviction for this offence, and the Statute generally, see *Nixon v. Nunney* (1 Q. B., 747).

any such house in company with such reputed thieves, or persons who shall not, being thereto required by any Justice, give a good account, to the satisfaction of such Justice, of his or her lawful means of support, and also of being in such house on some lawful occasion ;—and every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing, or procuring, or encouraging any child or children so to do, shall be deemed *an idle and disorderly person*. (Note *r*) (g) (H)

P. Impr. with h. l. not exc. 2 yrs.

S. 15 Vic., No. 4, s. 3. [*One Justice*].—(2) *Rogues and Vagabonds*].—Every person committing any of the offences hereinbefore mentioned, after having been before convicted as an idle and disorderly person ;—and all persons going about as gatherers of alms under false pretences of loss by fire or by other casualty, or as collectors under any false pretence ;—and all persons imposing or endeavouring to impose upon any charitable institution or private individual by any false or fraudulent representation, either verbally or in writing, with a view to obtain money or some other benefit or advantage ;—every person wilfully exposing to view in any street, road, thoroughfare, highway, or public place, or who shall expose or cause to be exposed to public view in the window or other part of any shop or other building situate in any street, road, thoroughfare, highway, or public place, any obscene book, print, picture, drawing, painting, or other indecent exhibition or representation ;—every person wilfully and obscenely exposing his or her person in any street, road, or public highway, or in the view thereof, or in any place of public resort ; (i)—every person playing or betting in any street, road, highway, or other open and public place, (x) at or with any table or instrument of gaming, (L) at any game or pretended game of chance ;—every person having in his or her custody or possession (M) any picklock, key, crow, jack, bit, or other implement, with

(g) Any house kept, or purporting to be kept, for the reception, lodging, or entertainment of travellers or others, suspected to conceal, &c., idle and disorderly persons, &c., may be searched by virtue of a warrant of a Justice; and every idle and disorderly person, &c., found therein may be apprehended and dealt with accordingly. (S. 12).

(H) For Form of conviction by a Justice on his own view, see Part II. Ch. II., No. 33.

(i) In *R. v. Holmes*, (1 Dears. C. C., 207), it was held on an indictment charging the prisoner with exposing his person in a public omnibus in the presence and view of several persons, that an omnibus was a sufficiently public place to support the indictment. See also *ex parte Landregan*, March 19th, 1865, Part III.

(x) See in *re Freestone*, (25 L. J. M. C., 121). In this case it was decided that a railway carriage, not alleged to be travelling on a railway at the time, was not "an open and public place" within the meaning of the Act. It is clear that the "other open and public place" must be *ejusdem generis*, as a "street," &c. It has been decided that the river *Thames* is a "highway" within the meaning of the Act.

(L) There has been a difference of opinion as to whether playing cards are instruments of gaming within the meaning of the Act. In *R. v. Roach*, cited 20 J. P., 546, Crowder, J., at chambers, decided that they were not ; but in *R. v. Hance*, cited 20 J. P., 623, 639, Bramwell, B., at chambers, upon the authority of a previous case, decided by Marten, B., at chambers, held that cards were instruments of gaming ; and in *re Grant*, 21 J. P., Coleridge, J., at chambers, and afterwards the full Court of Queen's Bench (*Id.*, 70), decided the same way. (Arnold N. C., 616).

(M) *Quære*, at time of apprehension. (*R. v. Brown*, 8 T. R., 26).

be, and duly convicted thereof,—and every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of offence for which he shall have been so apprehended, shall be deemed an *incorrigible rogue*.

P. Impr. until the next Quarter Sessions, to be held in the district wherein, or nearest to which, the said offence was committed, with h. l. (Q) (R)

S. *Id.*, s. 5. [*One Justice*].—(4) Any person singing any obscene song or ballad, or writing or drawing any indecent or obscene word, figure, or representation, or using any profane, indecent, or obscene language, in any public street, thoroughfare, or place, or within the view or hearing of any person passing therein.

P. Fine not exc. £5; and, in default of immediate payment, impr. not exc. 3 cal. m.

N.B.—*The offender may be apprehended by any constable or other person, and conveyed before a Justice.*

S. *Id.*, s. 6. [*One Justice*].—(5) Any person using any threatening, abusive, or insulting words or behaviour in any public street, thoroughfare, or place, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned. (s)

P. Same as offence (4).

S. *Id.*, s. 12. [*One Justice*].—(6) Any constable or other peace officer neglecting his duty in anything required by this Act, or any person disturbing or hindering any constable, peace officer, or other person in the execution of this Act, or aiding, abetting, or assisting in so doing.

(q) S. 10. When any Justice shall commit any such incorrigible rogue to any goal, &c., to remain till the next Quarter Sessions, or when any such idle or disorderly person, rogue and vagabond, or incorrigible rogue shall give notice of his or her intention to appeal, &c., and shall enter into the required recognizance, such Justice shall require the person by whom the offender shall be apprehended, and the person whose evidence he shall think material, to become bound by recognizance to appear at the Quarter Sessions to give evidence; and if such person refuse to enter into such recognizance, such Justice shall commit such person to gaol, to remain there till he shall enter into such recognizance, or be otherwise discharged by due course of law. And, by s. 11, When any incorrigible rogue shall have been committed to any gaol, &c., there to remain until the Quarter Sessions, such Justices of the Peace, in Quarter Sessions assembled, may in a summary way examine into the circumstances of the case, and, on conviction, order that such offender be further imprisoned therein, and be kept to hard labour for not exceeding one year from the making of such order.

(x) S. 16. The Justice, &c., before whom the conviction shall take place is required to transmit the said conviction to the Clerk of the Peace of the district, to be by him filed and kept of record, and a copy of the conviction so filed, duly certified by the said Clerk, is made evidence in any Court of Record, or before any Justice or Justices acting under the power and provisions of this Act; and such and the like returns of such convictions shall be made and inserted in the general returns of all proceedings and convictions had before the Justices, and be transmitted to such office as is required by law.

By s. 19, one moiety of the penalty to go to H. M.; one moiety to the "Police Reward Fund."

(s) In ——— May, 1855, The Court held that the word "place," in this section, (s. 6), did not comprehend a shop or dwelling. See Note (p).

P. Fine not exc. £5; on neglect or refusal forthwith to pay the same, impr. not exc. 3 cal. m., or until payment. (τ)

WEIGHTS AND MEASURES.

S. 16 *Vic., No. 34, s. 3.* [*Two Justices*].—(1) Any Clerk of Petty Sessions falsifying or otherwise wilfully injuring copies or models of standard weights and measures (see s. 3) deposited with him. (v)

P. Fine £50; if not, together with all costs and charges, paid forthwith, impr. not exc. 3 cal. m. unless sooner paid. (S. 20). (w) See s. 23 of 11 & 12 *Vic.*, c. 43.

S. *Id.*, s. 6. [*Two Justices*].—(2) Any Clerk of Petty Sessions failing, neglecting, or refusing to compare any such weights and measures as shall be brought before him, respectively, with such copies or models deposited as aforesaid, at all such reasonable times as he shall be thereunto required, upon tender of the sum of threepence for every weight, &c., so compared.

(τ) *Appeal*.—To the next Quarter Sessions which shall be held in the district or place wherein or nearest to where such offence shall have been committed, giving to the Justice or Justices whose act or determination shall be appealed against, notice, in writing, of such appeal, and of the ground thereof, within seven days after such act or determination, and before the next Quarter Sessions, and entering within such seven days into a recognizance with sufficient sureties before a Justice of the Peace for the district or place in which such person shall have been convicted, personally to appear and prosecute such appeal; and upon such notice being given, and such recognizance being entered into, such Justice is hereby empowered to discharge such person out of custody; and the Court of Quarter Sessions shall hear and determine the matter of such appeal in a summary way, and shall make such order as may be meet; and in case of dismissal of the appeal through the non-appearance of the appellant or otherwise, or the affirmation of the conviction, shall issue the necessary process for the apprehension and punishment of the offender, according to the conviction. (S. 14).

(v) By s. 3, It shall be lawful for the Governor to cause copies and models of the several weights and measures deposited in the Colonial Treasury (s. 3) to be carefully made, and, upon every such copy or model being verified on oath before the Colonial Treasurer, (which oath he is hereby authorized to administer), and approved of by the said Governor, to cause a mark or stamp to be legibly impressed or engraven thereon, to show that the same has been so verified and approved; and such mark or stamp shall consist of such letters and figures as are commonly used to signify Her Majesty's name or mark, together with S. W. or S. M., signifying standard weight or standard measure, as the case may be, and the number of pounds or other denomination of such weight or measure; and such copies or models, after having been so verified, approved, and marked, shall be deposited with the respective Clerks of the several and respective Petty Sessions appointed to be holden in the said Colony, and shall be by them respectively safely and securely kept for the purpose of reference; and copies and models already deposited under the former Act shall, until called in, be deemed legal weights, &c. (S. 4.)

(w) By s. 20. The Justices before whom any conviction shall take place shall cause the amount of the forfeiture which shall be levied or paid by virtue of any such conviction, to be applied towards the payment of a just and reasonable recompense and satisfaction of such person or persons as shall be appointed to examine weights and measures, and towards the other expenses of enforcing this Act; the residue (if any) to go to the use of Her Majesty. If any penalty or forfeiture, with all costs and charges, be not paid forthwith, the offender shall be imprisoned for any term not exceeding three cal. months, unless such penalties, &c., be sooner paid.

P. Fine £10: to be recovered as offence (1). (x)

S. Id., s. 8. [*Two Justices*].—(3) Any person using any vessel represented as containing the amount of any imperial measure, or of any multiple thereof, whether any wooden or wicker measure, glass, jug, or drinking cup, and refusing to make comparison with a stamped measure,—or, upon such comparison being made, such vessel (whether wooden or wicker measure, glass, jug, or drinking cup), being found deficient in quantity.

P. Fine the same as the next offence (4): recoverable as offence (1).

S. Id., s. 9. [*Two Justices*].—(4) Any person using any weight or measure other than such as shall have been compared and stamped under the provisions of this Act (s. 3), or using any weight or measure other than those authorized by this Act, or an aliquot part or multiple thereof, or which shall be found light or otherwise unjust.

P. Fine not exc. £5, except in troy weight, where fine shall be not exc. £50: recoverable as offence (1) (s. 20); and seizure and forfeiture of such unjust weight, &c.; the contract also is void. For “hereinbefore” in this s., read “hereinafter.”

S. Id., s. 14. [*Two Justices*].—(5) Any person selling any article by the heaped measure.

P. Fine not exc. 40s. for each sale: recoverable as offence (1).

S. Id., s. 16. [*Two Justices*].—(6) Any Inspector of Weights and Measures, or any other person legally authorized to examine and stamp any weights and measures, stamping any weight or measure without duly verifying the same by comparison with a copy of the standard, or being guilty of a breach of any duty imposed upon him by this Act, or otherwise misconducting himself in the execution of his office.

P. Fine not exc. £5: to be recovered as offence (1).

S. Id., s. 17. (y) [*Two Justices*].—(7) On examination by a Justice,

(x) S. 7. From time to time, as occasion shall require, the Justices, in their respective Petty Sessions, shall appoint one or more persons in their respective districts to be Inspectors of Weights and Measures for the discharge of the duties hereinafter mentioned; and the Governor shall cause to be delivered to such Inspector good and sufficient stamps for the stamping or sealing weights and measures used or to be used in the district for which such Inspectors, respectively, shall be appointed.

S. 16. Every Inspector shall enter into a bond or recognizance in the sum of £200 for the due and punctual performance of the duties of his office, and for the safety of the stamps and copies of the standard weights and measures committed to his charge, and for their due restoration and surrender to the person appointed to receive them by the Justices by whom he may have been appointed, immediately on his removal or other cessation of office; and every such Inspector shall be entitled to fees, according to the scale in the 2nd Schedule of the Act, for every such examination, comparison, and stamping as is required to be made by him.

(y) *Justice or Inspector may enter Shops and examine Weights, &c.*—By s. 17, A Justice, or Inspector authorized in writing, may at all seasonable times enter any shop, store, house, warehouse, stall, yard, or place whatsoever wherein goods shall be exposed and kept for sale, or shall be weighed for purchase, conveyance, or carriage, and there to examine all weights, measures, steelyards, or other weighing machines, and to compare and try the same with the copies of the standard weights and measures required or authorized to be provided under this Act; and, if the said weights or measures be found light or otherwise unjust, or such steelyard or other weighing machine is incorrect or otherwise unjust, they

or an Inspector authorized in writing by a Justice, of any shop, store, house, warehouse, stall, yard, or place whatsoever wherein goods are exposed or kept for sale, or weighed for purchase, or for conveyance or carriage, with the copies of the standard weights and measures, any weights and measures being found light or otherwise unjust, or any steelyard or other weighing machine being found incorrect or otherwise unjust.

P. Fine not exc. £5; or for troy weights or weighing machine used with ivory weights, fine not exc. £50: recoverable as offence (1); every such light weight and unjust measure is liable to seizure.

S. *Id.*, s. 18. [*Two Justices*].—(8) Any person wilfully obstructing, hindering, resisting, or in any wise opposing any of the persons hereby authorized and empowered to view and examine such balances, weights, and measures in the execution of his office; or any person selling or retailing, or purchasing, or charging by weight or measure, and refusing to produce his balances, weights, or measures, in order to be viewed or examined.

P. Fine £5—£2: recoverable as offence (1).

S. *Id.*, s. 19. [*Two Justices*].—(9) Any person making, forging, or counterfeiting, or causing or procuring to be made, forged, or counterfeited, or knowingly acting or assisting in the making, forging, or counterfeiting, any stamp or mark now used, or which may hereafter be used, for the stamping or marking of any weights or measures under this Act.

P. Fine £50—£10: recoverable as offence (1).

S. *Id.* [*Two Justices*].—(10) Any person knowingly selling, altering, disposing of, or exposing to sale any weight or measure, with such forged or counterfeit stamp or mark thereon.

P. £10—£2: recoverable as offence (1).

N.B.—*All weights and measures with such counterfeit stamps to be forfeited and broken up.*

WITNESS.

S. 11 & 12 Vic., c. 42, s. 16. [*One Justice*].—(1) *In Indictable Cases*.—Any person summoned as a witness by a Justice for the prosecution, either appearing in obedience to the said summons, or being brought before him by a warrant, refusing to be examined upon oath or affirmation concerning the premises;—or refusing to take such oath or affirmation;—or, having taken such oath or affirmation, refusing to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal.

may be seized. An Inspector authorized in writing under the hand of any Justice may make the like entry, examination, and seizure. (*Vide Forms, post, Part II*). A general authority is sufficient, and it is not necessary that the Inspector should also have a special authority upon each particular occasion. (*Hutchings v. Reeves*, 9 M. & W., 747, and the colonial case of *in re Godfrey*,—September 1857.)

Application of Fines.—Upon conviction, the convicting Justice may cause the amount of the forfeiture which shall be levied or paid by virtue of such conviction to be applied towards the payment of a just and reasonable recompense and satisfaction of the persons appointed to examine weights and measures, and towards other expenses of carrying this Act into execution; and the residue shall go to Her Majesty. (S. 20).

P. Impr. not exc. 7 days, unless he shall in the meantime consent to be examined, and to answer concerning the premises. (z)

S. 11 & 12 Vic., c. 43, s. 7. [*One Justice*].—(2) *In cases of Summary Conviction*.—Any person summoned as a witness by a Justice on behalf of the prosecutor, or complainant, or defendant, on the hearing of any information or complaint, either appearing in obedience to the said summons, or being brought before him by a warrant, refusing to be examined upon oath or affirmation concerning the premises;—or refusing to take such oath or affirmation;—or, having taken such oath or affirmation, refusing to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal.

P. Impr. not exc. 7 days, unless he shall in the meantime consent to be examined, and to answer concerning the premises. (A)

(z) *Persons may be examined without a Subpœna*.—By s. 5 of 22 Vic., No. 7, Any person present at any trial or other proceeding wherein he might have been compellable to give evidence and produce documents by virtue of a subpoena or other summons or order duly issued and served for that purpose, shall be compellable to give evidence and produce documents then in his possession and power, in the same manner, and in case of refusal shall be subject to the same penalties and liabilities, as if he had been duly subpoenaed or summoned for that purpose.

And, by s. 13, Where any person duly bound by recognizance, or served with a subpoena to attend in any Court as a witness at the trial of any case, civil or criminal, shall fail to appear when called in open Court, either at such trial or upon the day appointed for such trial, it shall be lawful for the Court, upon proof of such recognizance, or of his having been duly served with such subpoena, to call upon such person to show cause why execution upon such recognizance, or why an attachment for disobedience to such subpoena, should not be issued against him; or upon proof of those facts, and also that person's non-appearance was without just cause or reasonable excuse, and upon oath that he will probably be able to give material evidence, to issue a warrant to bring him before the Court to give evidence at such trial. (S. 13).

(A) *In cases of Summary Conviction*.—The 11 & 12 Vic., c. 43, s. 7, contains similar provisions with those of c. 42, s. 16, as to summoning a witness on behalf of the prosecutor, or complainant, or defendant, or bringing him up for disobedience of summons, (upon proof that a reasonable sum was paid or tendered to him for his costs and expenses in that behalf), or in the first instance.

By s. 36, several Statutes and parts of Statutes are repealed, "and all other Act or Acts, or parts of Acts, which are inconsistent with the provisions of this Act, save and except so much of the said several Acts as repeal any other Act or parts of Acts." There are numerous Statutes which impose penalties on persons for refusing to give evidence, some of them making it an offence either to refuse to appear to a summons, or to refuse to give evidence upon appearance; others making the offence consist, simply, in refusing to appear; others, again, (as in *Jervis's Acts*), giving the power to bring the party summoned, upon a warrant, before a Justice, and limiting the offence to the refusal to give evidence. Some Statutes, again, impose the penalty of imprisonment for the offence, without fine, and others impose a pecuniary penalty, recoverable by distress, with the alternative of imprisonment in default of distress.

As the provisions of these Acts are inconsistent with the provisions of *Jervis's Act*, 11 & 12 Vic., c. 43, on this subject, it may be presumed that the former are repealed; but, if there is any doubt upon the point, it would place Justices in this rather awkward dilemma,—if an earlier Statute, imposing a pecuniary penalty, enforceable by distress and imprisonment, is not repealed, a Justice who should proceed under *Jervis's Act* by imprisonment only, would be liable to an action for false imprisonment; if, on the other hand, the earlier Statute is repealed, and a Justice should act under it by distress, &c., he would be liable to an action of trespass;—as in either case he would have exceeded his jurisdiction. See 11 & 12 Vic., c. 44, s. 2. (Arnold, S. C., p. 645).

N.B.—*It seems this penalty may be incurred toties quoties.*

WIVES (DESERTED).

4 Vic., No. 5. *Where Wife deserted, application to be made to a Justice*].—S. 1. If it be made to appear to the satisfaction of any Justice that any married woman hath been unlawfully deserted by her husband, or left by him without means of support, such Justice, on complaint on oath by her, or any reputable person in her behalf, may issue a summons, directing the husband to appear before two Justices to show cause why she should not be supported by him; and in any such case of desertion, the Justice, upon proof on oath, may issue a warrant for the husband's apprehension, to compel such appearance.

Order of Maintenance to be by two Justices].—*Id.*, s. 2. On the day appointed for such appearance, (whether the party shall be taken on such warrant, or cannot, after strict inquiry and search, be found, or shall appear on such summons, or having been summoned shall fail to appear), such two, or any other two Justices, shall proceed to inquire into such complaint, and, if satisfied that the wife is in fact without means of support, and her husband is able to maintain her, or contribute to her maintenance, they shall make an order in writing, directing him to pay weekly or monthly, at their discretion, (and to such person or in such manner, for her use, as they think fit), such moderate sum or allowance as they shall think proper: Provided, that on any application by or on behalf of the husband or wife, or for any other cause, the Justices may adjourn the inquiry as they shall deem expedient.

Seizure and Sale of Offender's Goods].—*Id.*, s. 3. If in any case it shall appear to the Justices that (in addition to the last particulars) the husband hath deserted his wife, they may, in and by said order, authorize some person forthwith to seize and sell such husband's goods and chattels, and to demand and receive his rents, or such portion of them respectively as they shall think fit, and to appropriate the proceeds towards the payment of such allowance, in such manner as they shall from time to time direct; and the like order may be made, and authority be given, by any two Justices, upon complaint made for that purpose before them, in any case where the husband has left the Colony, &c., where he has previously usually resided, (and that fact shall appear on oath to them), without the previous issue of a warrant or summons.

Complainant's Affidavit, Evidence of Marriage].—*Id.*, s. 4. Any woman making complaint to any Justice of having been actually deserted by her husband, or left by him without sufficient means of support, shall produce before such Justices appointed to inquire into the complaint, direct evidence of her marriage with the person against whom complaint is made; or, in case of her inability to produce such direct evidence to the satisfaction of the Justices, shall make affidavit before them, setting forth the time, place, and circumstances of the said marriage; and her affidavit shall be deemed sufficient to authorize such Justices to make an order for her maintenance by her husband, in the manner provided by this Act, and such order shall continue in force till rescinded by the same, or any two other Justices, on sufficient proof being given before them of the falsity of the averments

sworn to by the woman: Provided, that it shall be in the discretion of the Justices, on any reasonable cause shown for such desertion or refusal of maintenance, to decline making any such order.

In *ex parte Hogan v. Scott*, July, 1855, the Court interpreted the words "*direct evidence*" of marriage, as meaning some evidence of actual marriage beyond that of mere reputation,—which was ordinarily sufficient in civil proceedings,—but not requiring the proof of the register of the marriage, or such like rigorous testimony.

Id., s. 5. Any woman who shall falsely depose in such affidavit as aforesaid, to the fact of her marriage with any man, for the purposes of obtaining from the Justices an order for any sum or allowance to be made by such man for or towards her support, shall, on conviction thereof, suffer such punishment as may by law be inflicted on persons convicted of wilful and corrupt perjury.

Id., s. 6. On the application of the Principal Superintendent of Convicts, or of the Chief Constable of the district in which any such woman may reside, the like proceedings may be had in the case of a convict married woman as in other cases.

Ss. 7, 8, & 9 will be found *ante*, pp. 39, 40, & 41. The fine authorized by s. 9 is to be recovered either by distress, (s. 19 of 11 & 12 Vic., c. 43), or according to 5 W. IV., No. 22. See "*Justices*," No. 2, p. 248, and *ante*, p. 40.

In *ex parte Ryan*, July, 1854, a warrant of commitment for disobedience to an order of maintenance under this Act was held to be bad, because it omitted to state that the complaint had been *on oath*; for the Court can assume nothing as to acts *giving jurisdiction*. See p. 257.

As to the procedure to be followed see s. 10, *ante*, p. 41.

Quarter Sessions may modify Orders].—S. 11. It shall be lawful for any Court of Quarter Sessions holden for the district within which any order under this Act shall have been made, (whether an appeal against the same shall have been entered or not), to quash, confirm, or vary any such order, either in the whole or in part, at their discretion, or to substitute a new order in lieu thereof, and for that purpose every order made by any two Justices under this Act shall be transmitted by them, under their hands and seals, to the Clerk of the Peace of the district, within twenty days next after the making of such order.

This power may be exercised by *two Justices*. (22 Vic., No. 5, s. 12, *ante*, p. 42).

As to the *appropriation of penalties*, see *ante*, p. 41.

22 Vic., No. 6. *Warrant of Apprehension*].—S. 1. Any Justice, on being satisfied by oath that any husband has, in violation of the Act 4 Vic., No. 5, deserted his wife, (see *infra*, ss. 6 & 7, as to evidence of desertion), or that any child has been so deserted by its father or mother, or that any husband or father or mother is about to remove from the Colony, or to remote parts within the same, to defeat the provisions of the said Act, or any order made in pursuance thereof, or of this Act, may issue a warrant for the apprehension of such husband or father or mother, to be dealt with as hereinafter, or as in the said Act, is mentioned.

On service of Summons, Warrant may issue, or proceed ex parte].—*Id.*, s. 2. Every summons issued under the said Act may be served on any

such husband or father or mother, either personally or (if he or she cannot be found) at his or her last or most usual known place of residence, and the party serving such summons may make affidavit of the service thereof, stating therein the mode and time and place of such service, (and, if not personally, that the defendant cannot be found), before any Justice, and such affidavit may be received by the Justices investigating the case as a sufficient proof of due service of the summons, if they shall think fit, and such Justices may thereupon proceed in the case *ex parte*, or may issue a warrant to apprehend the defendant so summoned.

Recognizance to be entered into.—*Id.*, s. 3. When an order is made for the maintenance of any wife or child, the Justices, if they think fit, immediately on pronouncing their decision, may require the defendant to enter into a recognizance with sureties for the due performance of such order, and, in default of so doing, may commit such defendant to gaol till such recognizance shall have been entered into or the said order complied with: Provided that no such recognizance or committal shall extend over a longer period than twelve months.

Judge's Order.—*Id.*, s. 4. (B) A wife deserted by her husband may at any time after such desertion apply *ex parte* to the Supreme Court, or to any Judge thereof, for an order to protect any personal property which she may acquire after such desertion, against her husband or his creditors, or any person claiming under him; and such order shall in cases be made, on such Court or Judge being satisfied by affidavit of the fact of such desertion, and that the same was without reasonable cause, and shall contain a statement of the day of such desertion, and shall have the effect of protecting all personal property acquired by such wife at any time after such desertion from her husband and his creditors, and all persons claiming under him, and while such order shall continue in force, such wife shall, with respect to such personal property as aforesaid, and to all contracts in reference thereto, and to all other contracts entered into by her after the making of such order, and not relating to real estate, be regarded in all respects as a *feme sole*; and if the husband, or any of his creditors, or any person claiming under him, shall, without the permission of the wife, seize, take, or hold possession of any property protected as aforesaid, such wife is hereby empowered to sue such husband, creditor, or other person, for the restoration of the specific property seized, taken, or held as aforesaid, and to recover in such suit in the event of such property not being restored, a sum equal to double the value of the same, with double costs of suit: Provided that the husband or any of his creditors, or any person claiming under him, at any time after the making of any such order as aforesaid, may apply, on notice to the wife, to the Supreme Court, or any Judge thereof, that such order may be rescinded, and the same shall be rescinded in all cases where it shall be proved to the satisfaction of such Court or Judge by affidavit or by *viva voce* examination, or both, that such wife was not deserted without reasonable cause, or that since the making of the order she and her husband have cohabited or resided together; and on such order being so rescinded, the husband shall

(B) Although these sections do not directly concern Justices, it may be desirable that they should explain to complainants the existence of these provisions.

have and enjoy, with respect to all personal property protected by such order, the same rights as he would have had if such order had not been made, and shall be entitled to sue on any contracts which his wife may have made while such order was in force, and be liable to be sued on all such contracts in the same manner as though they had been made by his wife before his marriage with her.

Id., s. 5. Nothing in this Act shall take away or diminish the Common Law liability of a husband in respect to contracts made by a wife deserted by her husband without reasonable cause.

Desertion, Evidence of.—*Id.*, s. 6. For the purpose of this Act, a wife compelled to leave her husband's residence under reasonable apprehension of danger to her person, or under other circumstances which may reasonably justify her withdrawal from such residence, shall be deemed and taken to have been deserted without reasonable cause. And by

Id., s. 7. Where any husband shall have quitted his wife, or any parent his or her children or child, for a period exceeding sixty days, during seven at the least of which such wife or children or child shall have been left by him or her without means of support, such husband or parent shall *prima facie* be deemed to have unlawfully deserted such wife or children or child: Provided that nothing in this section shall prevent the Justices from adjudging the fact of desertion on other evidence, or on proof of abandonment for a less period than sixty days, if they shall think fit.

Witness.—*Id.*, s. 8. In all proceedings under this or the recited Act, excepting always the now following section of this Act, the wife and the husband shall be competent and compellable to give evidence on her or his own behalf, and for or against the other: Provided that no admission or statement then made by either shall be used upon any other occasion.

Id., s. 9. If any parent shall, after the passing of this Act, wilfully and without lawful or reasonable cause or excuse, desert any of his children under the age of sixteen, and leave such child without means of support, such parent, being able to maintain such child, shall be deemed guilty of a misdemeanor, and shall, on conviction, be imprisoned for any period not exceeding twelve cal. months. See *ante*, p. 64.

Id., s. 10. Whenever any order is made for the maintenance of a wife under the 2nd section of the said recited Act, the Justices making such order, instead of or in addition to any relief or remedy provided by the said recited Act, may authorize and direct some person to demand and receive any annuity or other income payable to the husband, or any money received or receivable, or held by any person in trust, to be paid periodically, or by instalments, or otherwise, to or for such husband, or such portion of such annuity or income, or other money, as the said Justices shall think fit, and to appropriate the proceeds towards the payment of such allowance, in such manner as they shall from time to time direct; and every payment made in pursuance of any such order shall be as valid as if made to the husband, or by his authority or direction, and shall protect and indemnify any person acting in pursuance of such order.

Id., s. 11, Providing for the education of children for whose maintenance an order has been made, and s. 12, giving power to two Justices to vary orders, are given at length *ante*, p. 41—42.

M. at Com. Law. Bail comp.—Publicly exposing to sale and selling a wife.

P. Fine or impr., or both.

WITCHCRAFT.

Pretending to witchcraft. See 9 G. II., c. 5, s. 4.

WOMAN.

M. 16 Vic., s. 8. Bail disc.—Any person, by false pretences, false representations, or other fraudulent means, procuring any woman or child under 21 years of age to have illicit carnal connexion with any man. (c)

P. Impr. not exc. 2 yrs., with h. l.

WOOD (DEAD).

See "LARCENY."

WOUNDING.

See "ATTEMPTS."

WRECK.

See "LARCENY."

(c) A conspiracy to obtain this object is a misdemeanor at Common Law. (*Reg. v. Mears and Chalk*, 20 L. J. M. C., 59; *R. v. Delaval*, 3 Burr, 1434; 2 Russell on Crimes, 636).

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# THE AUSTRALIAN MAGISTRATE.

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## PART II.

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### JUSTICES.—No. 1.

#### CHAPTER I.

#### INDICTABLE OFFENCES.

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#### GENERAL FORMS OR OUTLINES.

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☞ All the Forms in this chapter, except where otherwise stated, are from the Schedule to Jervis's Act, 11 & 12 Vic., c. 42, as adapted by the Court of Quarter Sessions in Sydney, in 1851; and the letter, &c., after the description of the Form is the same as prefixed thereto in such Schedule.

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#### 1. *Information and Complaint for an Indictable Offence. (A.)*

To wit. { The information and complaint of C. D., of —, in the  
Colony of New South Wales, [*yeoman*], taken this — day of  
—, in the year of our Lord 186—, before the undersigned,  
one [*or two*] of Her Majesty's Justices of the Peace in and for the said  
[*Colony*], who saith\* that (A) [*&c., stating the offence*].

Sworn before me [*or us*] the day and year first above mentioned, at  
—, in the said Colony. J. S.

#### 2. *Information against an Accessory after the fact to a Felony with the Principal. (Not in Jervis's Act).*

[*Proceed as in No. 1, supra, and, after describing the offence of the principal, state thus*]: and that E. F., of, &c., well knowing the said A. B. to have committed the felony aforesaid, did afterwards, to wit, on the — day of — instant, at — aforesaid, feloniously receive, harbor, and maintain the said A. B.

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(A) If the offender is merely suspected to have committed the offence, and the informant did not see him commit it, insert here: "he hath just cause to believe and suspect, and doth believe and suspect, that"—then insert the name of the offender, address, &c., if known, or if unknown, his description as below, and afterwards set out the offence in the manner described in either of the statements applicable in Chapter III. of this portion of the work.

DESCRIPTION.—Height..... Color of hair..... Color of eyes.....  
Apparent age..... Complexion..... Distinctive marks..... Dress .....

3. *The like, without the Principal, or where Principal unknown.* (Not in Jervis's Act).

[*Proceed as in No. 1, supra, to the asterisk\*, then thus*]: that one A. B., of &c., [or some person or persons whose name or names is or are unknown], on the — day of —, at —, in the Colony aforesaid, &c., did feloniously [*describe the offence of the principal*]: and that E. F., of &c., well knowing the said A. B. [or person unknown] to have committed the felony aforesaid, did afterwards, to wit, on the — day of —, at —, in the Colony aforesaid, feloniously receive, harbor, and maintain the said A. B. [or person unknown].

4. *Information to grant Search Warrant for Stolen Goods.* (Not in Jervis's Act).

[*Proceed as in No. 1, supra, to the asterisk\*, then thus*]: that the following goods of [him] the said C. D., to wit, [*describe them*], were on the — day of — instant [or have lately been] feloniously stolen, taken, and carried away from and out of the dwelling-house [or as the case may be] of the said C. D., situate at —, in the [Colony] aforesaid: And that he this informant hath probable cause to suspect, and doth suspect, that the said goods, or part thereof, are concealed in the dwelling-house or premises [or as the case may be] in the occupation of A. B., situate at —, in the said [Colony].

5. *Dying Declaration before a Justice in cases of personal Injuries to the Declarant.* (Not in Jervis's Act). See "Evidence," Part I., p. 104.

No particular form of this declaration is necessary; but it may be as well to state in this place that its principal ingredients, in order to its admissibility in evidence against a prisoner, are:—

1. The cause of the death of the declarant must be the subject of inquiry.
2. The circumstances of the death, the subject of the declaration.
3. It must appear to have been made at a time when the declarant (deceased) was perfectly aware of his danger, and entertained no hope of recovery.

If the accused can be brought into the presence of the person injured, the examination should be taken in the usual form; but, if otherwise, the declaration, *not on oath*, should be taken by a Justice in somewhat like the following form, viz.:—

"I, C. D., of —, in the [Colony] of —, do hereby solemnly and sincerely declare that [*here set out the statement in the very words used*].

"Taken before me, at —, in the [Colony] of —, this — day of —, 18—. J. S., one of Her Majesty's Justices of the Peace in and for the Colony of New South Wales."

6. *Warrant to apprehend a Person charged with an Indictable Offence.* (B.)

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [Colony].

Whereas A. B., of —, in the said Colony, [*laborer*], hath this day been charged upon oath before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony], for that he

[or she] on the — day of —, at —, in the said Colony, did [*&c.*, *stating shortly the offence*]: These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him [or her] before me [or us], or some other of Her Majesty's Justices of the Peace in and for the said [Colony], to answer unto the said charge, and to be further dealt with according to law.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L.S.)

7. *Summons to a Person charged with an Indictable Offence.* (C.)

To A. B., of —, in the Colony of New South Wales, [*laborer*].

Whereas you have this day been charged before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that you on the — day of —, at —, in the said Colony, [*&c.*, *stating shortly the offence*]: These are therefore to command you, in Her Majesty's name, to be and appear before me [or us] on the — day of —, at — o'clock in the forenoon, at —, or before such other Justice or Justices of the Peace for the same [Colony] as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L.S.)

8. *Deposition of the Constable of the Service of the Summons.* (Not in Jervis's Act).

[This Form will be found in Part I., "Justices, No. 1," p. 177].

8 A. *Joint Deposition of the Clerk of the Bench and the Constable (where the latter cannot read), of the Service of the Summons.* (Not in Jervis's Act).

[This Form will be found in Part I., "Justices, No. 1," p. 178].

9. *Warrant where the Summons is disobeyed.* (D.)

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [Colony].

Whereas on the — day of — [*last past*], A. B., of —, in the said Colony, [*laborer*], was charged before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [*&c.*, *as in the summons*]: And whereas I [or we] then issued my [or our] summons to the said A. B., commanding him [or her] in Her Majesty's name to be and appear before me [or us] on the — day of —, 18—, at — o'clock in the forenoon, at —, in the said Colony, or before such other Justice or Justices of the Peace for the same [Colony] as might then be there, to answer to the said charge, and to be further dealt with according to law: And whereas the said A. B. hath neglected to be or appear at the time and place appointed in and by the said summons, although it hath now been proved to me [or us] upon oath that the said summons was duly served upon the said A. B.: These are therefore to

command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him [or her] before me, or some other of Her Majesty's Justices of the Peace in and for the said [Colony], to answer to the said charge, and to be further dealt with according to law.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L.S.)

10. *Search Warrant for Stolen Goods.* (Not in Jervis's Act).

To the Constable of —, in the Colony of New South Wales.

[*Proceed by reciting the information No. 4, ante, p. 430, to the end; then thus*]: These are therefore to command you, in Her Majesty's name, forthwith, with proper assistance, to enter the said dwelling-house and premises [or as the case may be] of the said A. B., in the day time, and there diligently search for the said goods; and if the same, or any part thereof, shall be found upon search, that you bring the goods so found, and also the body of the said A. B., before me, or some other of Her Majesty's Justices of the Peace in and for the said Colony, to be disposed of and dealt with according to law.

Given [ &c., as Form No. 9, *supra*, (D.) ]

11. *Warrant to apprehend a person charged with an Indictable Offence committed on the High Seas or abroad.* (E.)

For offences committed on the High Seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed "on the High Seas, out of the body of any county of this realm, (*sic*), and within the jurisdiction of the Admiralty of England."

For offences committed abroad for which the parties may be indicted in this country, the warrant also may be the same as in ordinary cases, but describing the offence to have been committed "on Land out of the Colony, to wit, at —, in the Indian or Pacific Ocean," as the case may be.

12. *Certificate of Indictment being found.* (F.)

I hereby certify, That at a Court of Oyer and Terminer and General Gaol Delivery, Circuit Court, [or a Court of General Quarter Sessions of the Peace], holden in and for the Colony of New South Wales, at —, in the said Colony, on the — day of —, an information was presented against A. B., therein described as A. B., late of —, in the said Colony, [*laborer*], for that he [*&c., stating shortly the offence*], and that the said A. B. hath not appeared or pleaded to the said information. Dated this — day of —, A. D. 186—. J. D.,

Clerk of Arraigns at the Circuit Court holden at —, in the said Colony, [or

Clerk of the Peace at the General Quarter Sessions of the Peace, holden at —, in and for the said Colony.]

13. *Warrant to apprehend a Person Indicted.* (G.)

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [Colony.]

Whereas it hath been duly certified by J. D., Clerk of Arraigns at the



Circuit Court, [or Clerk of the Peace at the General Quarter Sessions of the Peace], holden at —, in and for the said Colony, that, [*&c.*, stating the certificate]: These are therefore to command you in Her Majesty's name forthwith to apprehend the said A. B., and to bring him [or her] before me [or us], or some other Justice or Justices of the Peace in and for the said [Colony], to be dealt with according to law.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186 —, at —, in the Colony aforesaid. J. S. (L. S.)

14. *Deposition that the Person apprehended is the same who is Indicted.* (Not in Jervis's Act).

N. S. } The deposition of J. N., of —, in the Colony of New South  
Wales, constable, taken upon oath before me, the undersigned,  
to wit. } one of Her Majesty's Justices of the Peace in and for the said  
Colony, at —, in the same Colony, this — day of —, A. D. 186 —,

Who saith, I well know A. B., of &c., described in the certificate of T. D., Clerk of Arraigns in the — Circuit, [or Clerk of the Peace at the General Quarter Sessions of the Peace in and for —, in the said Colony], now produced by me; that I never heard mention of any other person of the same name as the said A. B. living at or near — aforesaid;\* that A. B. apprehended by [me], and now here present, is the same person who is charged in the indictment referred to in the said certificate. J. N.

Taken and sworn before me, the day and year and at the place above mentioned. J. S.

15. *Warrant of Commitment of a Person Indicted.* (H.)

To the Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the [Gaol] at —, in the said Colony.

Whereas by my [or our] warrant under my [or our] hand and seal, dated the — day of —, after reciting that it had been certified by J. D. [*&c.*, as in the certificate], I [or we] commanded the Chief Constable of —, in the said Colony, and all other Peace Officers of the said Colony, in Her Majesty's name forthwith to apprehend the said A. B., and to bring him [or her] before me [or us] the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony], or before some other Justice or Justices of the Peace in and for the said [Colony], to be dealt with according to law: And whereas the said A. B. hath been apprehended under and by virtue of the said warrant, and being now brought before me [or us], it is hereupon duly proved to me [or us] upon oath that the said A. B. is the same person who is named and charged in and by the said information: These are therefore to command you the said constable in Her Majesty's name forthwith to take and safely convey the said A. B. to the said [Gaol] at —, in the said Colony, and there to deliver him [or her] to the Keeper thereof, together with this precept; and I [or we] hereby command you the said Keeper to receive the said A. B. into your custody in the said [Gaol], and him [or her] there safely keep until he [or she] shall be thence delivered by due course of law.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186 —, at —, in the Colony aforesaid.

J. S. (L. S.)

16. *Deposition that the Person Indicted is the same who is in custody for some other Offence.* (Not in Jervis's Act).

[*Proceed as in the Form No. 14 to the asterisk\*, then thus*]: that A. B., now confined in the [*Gaol*] at —, in the said Colony, is the same person who is indicted and referred to in the said certificate.

17. *Warrant to detain a Person Indicted who is already in custody for another Offence.* (I.)

To the Keeper of the [*Gaol*] at —, in the Colony of New South Wales.

Whereas it hath been duly certified by J. D., *Clerk of Arraigns at the Circuit Court* [or *Clerk of the Peace for the Sessions*] holden at —, in and for the said Colony, that [*&c.*, *stating the certificate*]: And whereas I am [or we are] informed that the said A. B. is in your custody in the said [*Gaol*] at —, in the Colony aforesaid, charged with some offence or other matter; and it being now duly proved upon oath before me [or us] that the said A. B. so indicted as aforesaid, and the said A. B. in your custody as aforesaid, are one and the same person: These are therefore to command you in Her Majesty's name to detain the said A. B. in your custody in the [*Gaol*] aforesaid, until by Her Majesty's Writ of Habeas Corpus he [or she] shall be removed therefrom for the purpose of being tried upon the said information, or until he [or she] shall otherwise be removed or discharged out of your custody by due course of law.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186 —, at —, in the Colony aforesaid.

J. S. (L. S.)

18. *Indorsement in backing a Warrant.* (K.)

To wit. } Whereas proof upon oath hath this day been made before me  
 { one of her Majesty's Justices of the Peace for the said [*Colony*]  
 of —, that the name of J. S. to the within warrant subscribed  
 is of the handwriting of the Justice of the Peace within mentioned: I do  
 hereby authorize W. T., who bringeth to me this warrant, and all other  
 persons to whom this warrant was originally directed, or by whom it may  
 lawfully be executed, and also all constables and other peace officers of the  
 said [*Colony*], to execute the same within the last mentioned [*Colony*],  
 and to bring the said A. B., if apprehended within the same [*Colony*],  
 before me, or before some other Justice or Justices of the Peace of the  
 same [*Colony*], to be dealt with according to law.

Given under my hand, this — day of —, 186—.

J. L.

19. *Deposition that a Person is a Material Witness.* (Not in Jervis's Act).

[This will be the same as Form No. 16, *post*, Chap. II., except that the witness must be stated to be likely to give material evidence *for the prosecution* only]. It is proper in all cases to issue a summons to witnesses *for the accused*, if required.

20. *Summons of a Witness.* (L. 1).

To E. F., of —, in the Colony of New South Wales, [*laborer*].

Whereas information hath been laid before the undersigned, one [or two] of her Majesty's Justices of the Peace in and for the said [*Colony*] of—,

that A. B. [*&c., as in the summons or warrant against the accused*], and it hath been made to appear to me [*or us*] upon [*oath*] that you are likely to give material evidence for the [*prosecution*]: These are therefore to require you to be and to appear before me [*or us*] on the — day of — now instant [*or now next*], at — o'clock in the forenoon, at —, in the said [*Colony*], or before such other Justice or Justices of the Peace for the said [*Colony*] as may then be there, to testify what you shall know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my [*or our*] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)

21. *Deposition of Constable of the Service of the last Summons.* (Not in Jervis's Act).

[This will be the same as Form No. 8, *ante*, p. 431, no tender of expenses being necessary in indictable offences].

22. *Warrant where a Witness has not obeyed a Summons.* (L. 2).

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [*Colony*].

Whereas information having been laid before the undersigned, one [*or two*] of Her Majesty's Justices of the Peace in and for the said [*Colony*] of —, that A. B. [*&c., as in the summons*]; and it having been made to appear to me [*or us*] upon oath that E. F., of —, in the said Colony, [*laborer*], was likely to give material evidence for the prosecution, I [*or we*] did duly issue my [*or our*] summons to the said E. F., requiring him [*or her*] to be and appear before me [*or us*], on — day of —, at —, in the said Colony, or before such other Justice or Justices of the Peace for the same [*Colony*] as might then be there, to testify what he [*or she*] should know respecting the said charge so made against the said A. B. as aforesaid: And whereas proof hath this day been made before me [*or us*] upon oath of such summons having been duly served upon the said E. F.: And whereas the said E. F. hath neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before me [*or us*] on the — day of —, at — o'clock in the forenoon, at —, in the said Colony, or before such other Justice or Justices of the Peace for the same [*Colony*] as may then be there, to testify what he [*or she*] shall know concerning the said charge so made against the said A. B. as aforesaid.

Given under my [*or our*] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)

23. *Warrant for a Witness in the first instance.* (L. 3).

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [*Colony*].

Whereas information hath been laid before the undersigned, one [*or two*] of Her Majesty's Justices of the Peace in and for the said [*Colony*] of

—, that [*&c.*, *as in summons*]; and it having been made to appear to me [*or us*] upon oath that E. F., of —, in the said Colony, [*laborer*], is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence without being compelled so to do: These are therefore to command you to bring and have the said E. F. before me [*or us*] on the — day of —, at — o'clock in the forenoon, at —, in the said Colony, or before such other Justice or Justices of the Peace for the same [*Colony*] as may then be there, to testify what he [*or she*] shall know concerning the said charge so made against the said A. B. as aforesaid.

Given under my [*or our*] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)

24. *Warrant of Commitment of a Witness for refusing to be sworn, or to give Evidence.* (L. 4).

To the Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the [*Gaol*] at —, in the said Colony.

Whereas A. B. was lately charged before the undersigned, [*one*] of Her Majesty's Justices of the Peace in and for the said [*Colony*] of —, for that [*&c.*, *as in the summons*]; and it having been made to appear to [*me*] upon oath that E. F., of —, in the said Colony, [*laborer*], was likely to give material evidence for the prosecution, [*I*] duly issued [*my*] summons to the said E. F., requiring [*him*] to be and appear before [*me*] on the — day of —, at —, in the said Colony, or before such other Justice or Justices of the Peace as should then be there, to testify what he [*or she*] should know concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before [*me*], [*or being brought before [me] by virtue of a warrant in that behalf, to testify as aforesaid*], and being required to make oath or affirmation as a witness in that behalf, hath now refused so to do, [*or, being duly sworn as a witness, doth now refuse to answer certain questions concerning the premises which are here put to him*], without offering any just excuse for such [*his*] refusal: These are therefore to command you the said constable to take the said E. F., and [*him*] safely to convey to the [*Gaol*] at —, in the Colony aforesaid, and there deliver [*him*] to the said Keeper thereof, together with this precept; and [*I*] do hereby command you the said Keeper of the said [*Gaol*] to receive the said E. F. into your custody in the said [*Gaol*], and [*him*] there safely keep\* for the space of — days for [*his*] said contempt, unless [*he*] shall in the meantime consent to be examined and to answer concerning the premises; and for your so doing this shall be your sufficient warrant.

Given under [*my*] hand and seal, this — day of —, in the year of our Lord, 186—, at —, in the Colony aforesaid. J. S. (L. S.)

25. *Warrant of Commitment of a Witness for refusing to be sworn or to give Evidence, who attends without a Summons.* (Not in Jervis's Act).

To the Constable, &c., [*as in Form No. 24.* (L. 4)].

Whereas A. B. was this day brought before me, the undersigned, [*one*] of Her Majesty's Justices of the Peace in and for the said Colony of New

South Wales, for that [he] the said A. B. did on the — day of — last, at —, in the said [Colony], [*here state the charge as in the caption of the depositions*]: And whereas one E. F., of —, &c., here in the presence of the said A. B., now under examination before me the said Justice on the charge aforesaid, now voluntarily appears as a witness for the prosecution in that behalf, and the said E. F. appearing to [me], upon oath, likely to give material evidence for the prosecution, but, being required to make oath or affirmation as a witness in that behalf, hath now refused so to do, [or, being duly sworn as witness, doth now refuse to answer certain questions concerning the premises which are here put to him], without offering any just excuse for such [his] refusal: These are therefore to command you [*follow in the Form No. 24. (L. 4) to the asterisk\*, then thus*]: until he shall submit to be examined on oath or affirmation, and to answer concerning the premises; and for your so doing [*&c., to the end of No. 24.*].

#### 26. *Depositions of Witnesses. (M.) (B)*

To wit. } The examination of C. D., of —, in the Colony of New South Wales, [farmer], and E. F., of —, in the said Colony, [laborer], taken on [oath] this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid, before the undersigned, one [or two] of Her Majesty's Justices of the Peace for the said [Colony], in the presence and hearing of A. B., who is charged this day before me [or us]\* for that he [or she] the said A. B., on the — day of —, at —, in the said Colony, [*&c., describing the offence as in a warrant of commitment*]. (C)

This deponent C. D. on his [or her] oath saith as follows, [*&c., stating the deposition of the witness as nearly as possible in the words he uses. When his deposition is complete let him sign it*]. (D)

And this deponent E. F. upon his [or her] oath saith as follows, [*&c.*]

The above depositions of C. D. and E. F. were taken and [sworn] before me [or us] at —, in the said Colony, on the day and year first above mentioned. J. S.

[*If the accused is remanded, say here*]: "Remanded to the [*&c.*]"

(B) It is recommended that the caption and depositions be written on foolscap paper,—the caption on a half-sheet, and each witness commencing with a fresh sheet; and, instead of the witness's address being in the caption, inserting it at the commencement of his statement. This is the plan adopted in the City of London Police Courts, and is much approved. (Oke F., p. 275).

(C) Where the accused is charged with the commission of two or more felonies or misdemeanors committed at the same time and place in respect of different prosecutors, the offences may be included in one set of depositions, the second being stated as—"*And also with stealing [one coat] of the goods and chattels of, &c.*"

(D) Where the accused interposes an observation during the examination of a witness, insert it in this manner,—"*The prisoner here voluntarily says [put his very words]. The cross-examination should likewise be taken down as—*"Cross-examined by the prisoner, [or by Mr. W., attorney, or Mr. B., counsel for the prisoner]."*And where the accused himself cross-examines the witness, the answer as well as the question may be taken down, if desirable. See "Justices, No. 1," p. 183.*

[Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it, if he will]. A. B.

Taken before me [or us] at —, in the said Colony, the day and year first above mentioned. J. S.

\* The purport of the proviso in s. 18 of 11 & 12 Vic., c. 42, should also be stated to the accused; (see "Justices, No. 1," p. 186):—"And you are also clearly to understand that you have nothing to hope from any promise of favor, and nothing to fear from any threat, which may have been holden out to you to induce you to make any admission or confession of your guilt; but whatever you shall now say may be given in evidence against you upon your trial, notwithstanding such promise or threat." (See s. 1).

N.B.—If the accused, after making a statement, calls witnesses to account for his possession of the stolen property, or the like, write as follows at the foot of the statement:—The above-named prisoner, A. B., after making the above statement in answer to the charge, offers the following witnesses to be examined on his behalf, namely:—G. H., of —, in the said Colony, [laborer], and J. K., of the same place, [farmer], &c.

The said G. H. on his [oath] saith as follows:—[stating the words he uses in the usual manner].

The jurat will be the same as the foot of Form No. 26.

### 30. Recognizance to give Evidence. (O. 1).

Be it remembered, That on the — day of —, in the year }  
of our Lord 186—, C. D., of —, in the Colony of New South }  
To wit. } Wales, [farmer], [or C. D., of No. 2, — street, in the City }  
[or Town] of —, in the said Colony, [surgeon], of which said house he }  
is tenant], personally came before me [or us], one [or two] of Her }  
Majesty's Justices of the Peace for the said [Colony], and acknowledged }  
himself [or herself] to owe to our Sovereign Lady the Queen the sum of }  
— of good and lawful money of Great Britain, to be made and levied }  
of his [or her] goods and chattels, lands and tenements, to the use of our }  
said Lady the Queen, her Heirs and Successors, if he [or she] the said }  
C. D. (F) shall fail in the condition indorsed.

Taken and acknowledged the day and year first above mentioned, at —, in the said Colony, before me [or us]. J. S.

The condition of the within written recognizance is such, That whereas one A. B. was this day charged before me [or us], J. S., Justice of the Peace within mentioned, for that [&c., as in the caption of the depositions], if therefore he [or she] the said C. D. (G) shall appear at the next Court of Oyer and Terminer or General Gaol Delivery, [or Circuit Court, or at the next Court of General Quarter Sessions of the Peace], to be holden at —, in and for the Colony of New South Wales, on the — day of —, and there give such evidence as he [or she] knoweth upon an In-

(F) Or, if a surety for a witness, say here: "If M., the wife of D. M., or, F. G., of &c., under the age of twenty-one years."

(G) This recognizance may be adapted to several persons, by placing at the top the names, &c., of all the witnesses, and stating at the letter (F) and here: "if they the said several persons so bound, &c."

are therefore to command you the said constable to take the said E. F., and him [or her] safely to convey to the [Gaol] at —, in the Colony aforesaid, and therefore deliver him [or her] to the said Keeper thereof, together with this precept; and I [or we] do hereby command you the said Keeper of the said [Gaol] to receive the said E. F. into your custody in the said [Gaol], there to imprison and safely keep him [or her] until after the trial of the said A. B. for the offence aforesaid, unless in the meantime such E. F. shall duly enter into such recognizance as aforesaid, in the sum of — pounds, before some one [or two] Justice of the Peace for the said [Colony], conditioned in the usual form to appear at the next Court of Oyer and Terminer or General Gaol Delivery, [or Circuit Court, or General Quarter Sessions of the Peace], to be holden at —, in and for the Colony of New South Wales, on the — day of —, and there to give evidence upon any Information which may be then and there preferred against the said A. B. for the offence aforesaid, and also to give evidence upon the trial of the said A. B. for the said offence.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. [L. S.]

#### 34. *Subsequent Order to discharge the Witness.* (P. 2).

To the Keeper of the [Gaol] at —, in the Colony of New South Wales.

Whereas by my [or our] order dated the — day of — instant, [or last past], reciting that A. B. was lately before then charged before me [or us] for a certain offence therein mentioned, and that E. F., having appeared before me [or us], and being examined as a witness for the prosecution in that behalf, refused to enter into a recognizance to give evidence against the said A. B., I [or we] therefore thereby committed the said E. F. to your custody, and required you safely to keep him [or her] until after the trial of the said A. B. for the offence aforesaid, unless in the meantime he [or she] should enter into such recognizance as aforesaid: And whereas, for want of sufficient evidence against the said A. B., the said A. B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: These are therefore to order and direct you the said Keeper to discharge the said E. F. out of your custody as to the said commitment, and suffer him [or her] to go at large.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. [L. S.]

#### 35. *Warrant remanding a Prisoner.* (Q. 1).

To the Chief Constable of —, in the Colony of New South Wales, and to the [Keeper of the Gaol] at —, in the said Colony.

Whereas A. B. was this day charged before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [dec., as in the warrant to apprehend]; and it appears to me [or us] to be necessary to remand the said [A. B.]: These are therefore to command you the said constable in Her Majesty's name forthwith

within bounden A. B. was this day [*or on the — day of — last past*] charged before me [*or us*], for that [*dec., as in the warrant*]: And whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the — day of — [*instant*]; if therefore the said A. B. shall appear before me [*or us*] on the said — day of — [*instant*], at — o'clock in the forenoon, or before such other Justice or Justices of the Peace for the said [*Colony*] as may then be there, to answer [*further*] to the said charge, and to be further dealt with according to law, then the said recognizance to be void, or else to stand in full force and virtue.

38. *Notice of such Recognizance to be given to the Accused and his Sureties.* (Q. 3).

Take notice, that you A. B., of —, in the Colony of New South Wales, [*laborer*], are bound in the sum of —, and your sureties, L. M. and N. O., in the sum of — each, that you A. B. appear before me [*or us*] J. S., one [*or two*] of Her Majesty's Justices of the Peace for the [*Colony*] of —, on the — day of — instant [*or now next*], at — o'clock in the forenoon, at —, in the said Colony, or before such other Justice or Justices of the Peace for the same [*Colony*] as may then be there, to answer further to the charge made against you by C. D., and to be further dealt with according to law; and unless you A. B. personally appear accordingly, the recognizances entered into by yourself and sureties will be forthwith levied on you and them.

Dated this — day of —, 186—.

J. S.

39. *Certificate of Non-appearance to be indorsed on the Recognizance.* (Q. 4).

I [*or we*] hereby certify, That the said A. B. hath not appeared at the time and place in the above condition mentioned, but therein hath made default, by reason whereof the within-written recognizance is forfeited.

J. S.

40. *Register of Persons committed or held to Bail for Indictable Offences.*

| Name, &c.,<br>of Prisoner. | Prosecutor and Witnesses. |               | Offence<br>and Date. | Date of<br>Examination. | Where committed. |
|----------------------------|---------------------------|---------------|----------------------|-------------------------|------------------|
|                            | Name, &c.                 | Recognisance. |                      |                         |                  |
|                            |                           | £             |                      |                         |                  |

| Committing<br>Justices. | If Bailed. |         |          | Particulars of<br>Certificate of Expenses. | Whether Prisoner<br>convicted, & Sentence. |
|-------------------------|------------|---------|----------|--------------------------------------------|--------------------------------------------|
|                         | Sureties.  | Amount. | Justice. |                                            |                                            |
|                         |            | £       |          | £ s. d.                                    |                                            |



41. *Warrant to convey the Accused before a Justice of the Colony, &c., in which the Offence was committed.* (R. 1).

To W. T., Chief Constable of —, and to all other Peace Officers in the Colony of New South Wales.

Whereas A. B., of —, in the said Colony, [laborer], hath this day been charged before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of — for that [&c., as in the warrant to apprehend]: And whereas I [or we] have taken the deposition of C. D., a witness examined by me [or us] in this behalf; but inasmuch as I [or we] are informed that the principal witnesses to prove the said offence against the said A. B. reside at —, in the said [Colony] of — where the said offence is alleged to have been committed: These are therefore to command you the said Constable in Her Majesty's name forthwith to take and convey the said A. B. to —, in the said [Colony], and there carry him [or her] before some Justice or Justices of the Peace in and near unto the place where the offence is alleged to have been committed, to answer further to the said charge before him [or them], and to be further dealt with according to law; and I [or we] hereby further command you the said Constable to deliver to the said Justice or Justices the information in this behalf, and also the said deposition of C. D. now given into your possession for that purpose, together with this precept.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)

42. *Recognizance of Bail.* (S. 1).

To wit. } Be it remembered, That on the — day of —, in the year  
of our Lord 186—, A. B., of —, in the Colony of New South  
Wales, [laborer], L. M., of —, in the said Colony, [grocer],  
and N. O., of —, in the said Colony, [butcher], personally came before  
me [or us] the undersigned, one [or two] of Her Majesty's Justices of the  
Peace for the said [Colony], and severally acknowledged themselves to  
owe to our Lady the Queen the several sums following, (that is to say):  
the said A. B. the sum of —, and the said L. M. and N. O. the sum of  
— each, of good and lawful money of Great Britain, to be made and  
levied of their several goods and chattels, lands and tenements respec-  
tively, to the use of our said Lady the Queen, her Heirs and Successors, if  
[he] the said A. B. fail in the condition indorsed.

Taken and acknowledged the day and year first above mentioned, at  
—, in the said Colony, before me [or us].

J. S.

J. N.

*Condition in Ordinary Cases.*

The condition of the within written recognizance is such, That whereas the said A. B. was this day charged before me [or us], the Justices within mentioned, for that [&c., as in the warrant]; if therefore the said A. B. will appear at the next Court of Oyer and Terminer and General Gaol Delivery, [or Circuit Court, or Court of General Quarter Sessions of the Peace], to be holden at —, in and for the Colony of New South Wales, on the — day of —, and there surrender [himself] into the custody

of the Keeper of the [common Gaol] there, and plead to such information as may be filed against him [or her] for or in respect of the charge aforesaid, and take his [or her] trial upon the same, and not depart the said Court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

*Condition where the Defendant is entitled to a Traverser.*

The condition of the within written recognizance is such, That whereas the said A. B. was this day charged before me [or us] the Justices within mentioned, for that [*&c.*, *as in the warrant or summons*]; if therefore the said A. B. will appear at the next Court of General Quarter Sessions of the Peace, [or Circuit Court, or Court of Oyer and Terminer and General Gaol Delivery], to be holden at —, in and for the Colony of New South Wales, on the — day of —, and there to plead to such information as may be filed against him [or her] for or in respect of the charge aforesaid, and shall afterwards at the then next Court of General Quarter Sessions of the Peace, [or Circuit Court, or Court of Oyer and Terminer and General Gaol Delivery], surrender himself [or herself] into the custody of the Keeper of the [Gaol] there, and take his [or her] trial upon the said information, and not depart the said Court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

*43. Notice of the said Recognizance to be given to the Accused and his Bail. (S. 2).*

Take notice, that you A. B., of —, in the Colony of New South Wales, [laborer], are bound in the sum of —, and your [sureties L. M. and N. O.] in the sum of — each, that you A. B. appear, [*&c.*, *as in the condition of the recognizance*], and not depart the said Court without leave; and unless you the said A. B. personally appear and plead, and take your trial accordingly, the recognizance entered into by you and your sureties shall be forthwith levied on you and them.

Dated this — day of —, 186—.

J. S. (H)

*44. Certificate of Consent to Bail by the Committing Justice indorsed on the Commitment No. 52 or 53. (S. 3).*

I [or we] hereby certify, That I [or we] consent to the within-named A. B. being bailed by recognizance, himself in —, and [two] sureties in — each.

J. S.

*The like on a separate Paper. (S. 4).*

Whereas A. B. was on the — day of — now instant [or last past] committed by me [or us] to the Gaol at —, in the Colony of New South Wales, charged with [*&c.*, *naming the offence shortly*]:

I [or we] hereby certify, That I [or we] consent to the said A. B. being bailed by recognizance, himself in —, and [two] sureties in — each.

Dated the — day of —, 186—.

J. S.

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(H) *There should be added here, to show the Justice's authority: "The Justice of the Peace in and for the said Colony, before whom the recognizance was entered into."*

45. *Warrant of Deliverance on Bail being given for a Prisoner already Committed.* (S. 5).

To the Keeper of the Gaol at —, in the Colony of New South Wales.

Whereas A. B., late of —, in the said Colony, [laborer], hath before me, one [or us, two] of Her Majesty's Justices of the Peace in and for the said Colony,\* entered into his own recognizance, and found sufficient sureties for his [or her] appearance at the next Court of Oyer and Terminer and General Gaol Delivery, [or Circuit Court, or Court of General Quarter Sessions of the Peace], to be holden at —, in and for the said Colony, to answer our Sovereign Lady the Queen, for that [*&c.*, as in the commitment], for which he [or she] was taken and committed to your said Gaol: These are therefore to command you in Her said Majesty's name that, if the said A. B. do remain in your custody in the said Gaol for the said cause, and for no other, you shall forthwith suffer him [or her] to go at large.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)  
J. N. (L. S.)

46. *The like, by Committing Justice, on Recognizances of Sureties being taken before him, conditional on Accused entering into his own.* (Not in Jervis's Act). (1)

[Proceed as in form No. 45, *supra*, to the first asterisk,\* then thus]: found sufficient sureties for his appearance: [follow to the end, then add]: upon his duly entering into his own recognizance in the manner and form mentioned in my certificate indorsed upon the warrant of commitment in this behalf.

47. *Notice of Bail, where required to be given.* (Not in Jervis's Act).

C. D. against A. B., for —.

New South Wales } Take notice, that W. B., of No. —, — street, in the  
To wit. } [town] of —, and R. W., of —, will, on — next, the  
— day of — instant, at — o'clock in the forenoon,  
before such of Her Majesty's Justices of the Peace for the said [Colony] of New South Wales as shall be then present at the —, become bail for the personal appearance of the above-named A. B. at\* the next Court of Oyer and Terminer and General Gaol Delivery, [or Circuit Court, or Court of General Quarter Sessions of the Peace], to be holden at —, in the said [Colony], there to answer and plead to the indictment to be preferred against him for [embezzlement, or as the case may be], and take his trial upon the same.

[Or, if on remand, say from the asterisk\*, "the Petty Sessions to be held on the — day of —, at twelve o'clock at noon, at the —,

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(1) This is instead of the recognizance, as required by the 23rd section, (*ante*, p. 171), being transmitted to the keepers.

in —, to answer further to the charge of [embezzlement, or as the case may be], made against him”].

Dated this — day of —, 186—.

T. W., Solicitor for the said A. B.

To Mr. C. D., the prosecutor,  
[or Mr. O. B., Solicitor for the prosecution].

48. *Complaint of Bail for a Person charged with an Indictable Offence, in order that he might be committed in Discharge of their Recognizances.* (Not in Jervis's Act).

[Proceed in the form No. 1 (A.), ante, to the asterisk\*, altering it to two complainants, if there be more than one surety, then thus]: that they, the said C. D. and E. F., were on the — day of — now last past, severally and respectively duly bound by recognizance before J. P., Esquire, one of Her Majesty's Justices of the Peace for the said [Colony], in the sum of — each, upon condition that one A. B., of &c., should appear at the next Court of Oyer and Terminer and General Gaol Delivery, [or Circuit Court, or Court of General Quarter Sessions of the Peace], to be holden at —, in the said [Colony], and there surrender himself into the custody of the Keeper of the [Gaol] there, and plead to such indictment as might be found against him by H. M.'s Attorney-General [or Crown Prosecutor, &c.] for or in respect of the charge of [stating the charge shortly], and take his trial upon the same, and not depart the said Court without leave; and that these complainants have reason to suspect and believe, and do verily suspect and believe, that the said A. B. is about to depart from this part of the country; and therefore they pray of me the said Justice that I would issue my warrant of apprehension of the said A. B. in order that he may be surrendered to prison in discharge of them his said bail.

Before me, J. P.

C. D.  
E. F.

49. *Warrant to apprehend the Person charged.* (Not in Jervis's Act). (κ)

To the Chief Constable of —, and to all other Peace Officers in the Colony of New South Wales, and to C. D. and E. F., severally and respectively.

New South } Whereas you, the said C. D. and E. F., have this day made  
Wales } complaint to me, the undersigned, one of Her Majesty's Jus-  
to wit. } tices of the Peace in and for the said Colony, that you the  
said C. D. and E. F. were [&c., as in the complaint No. 48, supra, to the end]: These are therefore to authorize you, the said C. D. and E. F., and also to command you, the said constable, in Her Majesty's name forthwith to apprehend the said A. B., and to bring him before me, or some other Justice or Justices of the Peace in and for the said Colony, to the intent that he may be committed to the [Gaol] at —, until the next Court of Oyer and Terminer and General Gaol Delivery, [or Circuit Court, or Court of General Quarter Sessions of the Peace], to be holden at —, in the

(κ) The bail may apprehend their principal without warrant, (1 Hale's Sum., 96); and therefore this warrant is not indispensably requisite, but it may prevent any breach of the peace.

said Colony, unless he find new and sufficient sureties to become bound for him in such recognizance as aforesaid.

Given under my hand and seal, this — day of —, in the year of our Lord, 186—, at —, in the said Colony. J. S. (L. S.)

50. *Commitment of the Person charged, on Surrender of his Bail after Apprehension under Warrant.* (Not in Jervis's Act).

To the Constable of —, and to the Keeper of the Gaol at —, in the Colony of New South Wales.

New South } Whereas, on the — day of — instant, complaint was  
Wales } made to me the undersigned, (or J. S.), one of Her Majesty's  
to wit. } Justices of the Peace in and for the said [Colony], by C. D.  
and E. F., of &c., that [as in the complaint No. 48, *supra*, to the end], I  
[or the said Justice] thereupon issued my warrant, authorizing the said  
C. D. and E. F., and also commanding the said constables of —, and  
all other Peace Officers in the said [Colony], in Her Majesty's name forth-  
with to apprehend the said A. B., and to bring him [follow to end of war-  
rant No. 49, *supra*]: And whereas the said A. B. hath been apprehended  
under and by virtue of the said warrant, and being now brought before me  
the said Justice, [or, me the undersigned, one, &c.], and surrendered by  
the said C. D. and E. F., his said sureties, in discharge of their said recog-  
nizances, I have required the said A. B. to find new and sufficient sureties  
to become bound for him in such recognizance as aforesaid, but the said A.  
B. hath now refused to do so: These are therefore to command you the  
said constable in Her Majesty's name forthwith to take and safely con-  
vey the said A. B. to the said [Gaol] at —, in the said [Colony], and  
there to deliver him to the said Keeper thereof, together with this precept;  
and I hereby command you the said Keeper to receive the said A. B. into  
your custody in the said [Gaol], and him there safely to keep until the  
next Court of Oyer and Terminer and General Gaol Delivery, [or Circuit  
Court, or Court of General Quarter Sessions of the Peace], to be holden at  
—, in the said [Colony], unless in the meantime the said A. B. shall  
find new and sufficient sureties to become bound for him in such recogni-  
zance as aforesaid.

Given, &c. [as form No. 49, *supra*].

51. *The like, where apprehended by the Bail without Warrant.* (Not in Jervis's Act).

To the Constable of —, and to the Keeper of the [Gaol] at —, in the Colony of New South Wales.

New South } Whereas A. B., of &c., hath been this day brought before  
Wales } me, the undersigned, one of Her Majesty's Justices of the  
to wit. } Peace in and for the said [Colony], and surrendered in dis-  
charge of his bail by C. D. and E. F., who it duly appears to me on the  
— day of — last past, severally and respectively became duly bound  
by recognizance before J. P., Esquire, one of Her Majesty's Justices of  
the Peace in and for the said [Colony], in the sum of — each, con-  
ditioned for the personal appearance of the said A. B. at the next Court of  
Oyer and Terminer and General Gaol Delivery, [or Circuit Court, or  
Court of General Quarter Sessions of the Peace], to be holden at —, in

the said Colony, and there surrender himself into the custody of the Keeper of the [Gaol] there, and plead to such indictment as might be found against him by H. M. Attorney-General [or C. D., Crown Prosecutor for — district] for or in respect of the charge of [stating the charge shortly], and take his trial upon the same, and not depart the said Court without leave,— they, the said C. D. and E. F., as such bail, praying that the said A. B. may be committed in discharge of their said recognizance: And whereas the said A. B., being by me required to find new and sufficient sureties to become bound for him in such recognizance as aforesaid, hath now refused so to do: These are therefore [ &c., to the end of Form No. 50, supra].

52. *Warrant of Commitment.* (T. 1).

To the Chief Constable of —, and to the Keeper of the Gaol at —, in the Colony of New South Wales.

Whereas A. B. was this day charged (L) before me, [or us], J. S., one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, on the oath of C. D. of —, in the said Colony, [farmer], and others, for that [ &c., stating shortly the offence]: These are therefore to command you the said constable of —, to take the said A. B., and him [or her] safely to convey to the Gaol at — aforesaid, and there to deliver [him] to the Keeper thereof, together with this precept; and I [or we] do hereby command you the said Keeper of the said Gaol to receive the said A. B. into your custody in the said Gaol, and there safely keep him [or her]\* until he [or she] shall be thence delivered by due course of law.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid. J. S. (L.S.)

53. *Detainer of a Prisoner on second charge of Felony or Misdemeanor.*

To the Keeper of the [Gaol] at —, in the [Colony] of New South Wales.

Detain in your custody the body of A. B., he being further charged before me J. S., one of Her Majesty's Justices of the Peace in and for the said [Colony] of —, and on the oath of C. D. of —, [farmer], and others, for that [ &c., stating the offence as in a Commitment], until he shall be thence delivered by due course of law; and for your so doing this shall be your sufficient warrant.

Given [ &c., as in No. 52, supra].

54. *Gaoler's Receipt to the Constable for the Prisoner, [and Justice's Order thereon for payment of the Constable's expenses in executing the Commitment].* (*Quære?*—It is so given in the 'Gazette' of 20th June, 1851). (T. 2).

I hereby certify, That I have received from W. T., constable of —, in the Colony of New South Wales, the body of A. B., together with a warrant under the hand and seal of [J. S., Esquire], one [or two] of Her Majesty's Justices of the Peace in and for the [Colony] of —; and that

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(L) If another person is accused, but is held to bail, insert here: "with one M. M., who has been held to bail."

the said A. B. was [sober, or as the case may be] at the time he [or she] was so delivered into my custody. P. K.,

Keeper of the House of Correction [or Common Gaol] at —.

55. *Gaoler's Certificate of the amount of Money found on Accused, on receiving him in Gaol.* (Not in Jervis's Act). (M)

I also certify that the within-named A. B. had at the time of his delivery into my said custody the sum of —, and that the same is now held by me. P. K., Keeper, &c.

## JUSTICES.—No. 2.

### CHAPTER II

#### SUMMARY CONVICTIONS AND ORDERS.

#### GENERAL FORMS OR OUTLINES.

§ The Forms in this Chapter, except where otherwise stated, are from the Schedule to Jervis's Act, 11 & 12 Vic., c. 43, as adapted by the Court of Quarter Sessions in Sydney, in 1851; and the letter, &c., after the description of the Form is the same as prefixed thereto in such Schedules.

1. *Information or Complaint with or without Oath, with Variation when substantiated by another Person than the Informant, Prosecutor, or Complainant.* (Not in Jervis's Act.)

New South Wales } The information [or complaint] of C. D., of —, to wit. } in the [Colony] of New South Wales, [laborer],

If preferred by an attorney or agent, say: "by D. E., his duly authorised agent [or 'attorney'] in this behalf."

taken [upon oath, if so required] before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the said Colony, at —, in the said [Colony], this — day of —, in the year of our Lord 186—, who saith\* that [he hath just cause to suspect and believe, and doth suspect and believe that] A. B., of —, in the said Colony, [laborer], [within the space of —, the time within which the information or complaint must be laid, last past, to wit] on the — day of — instant, at —, in the Colony aforesaid,\*\* did [here set out the offence, &c., in the manner described in either of the special Forms of statements of offences in Chap. III., post], contrary to the form of the Statute in such case made and provided. C. D. [or D. E.]

\* \* If a warrant is granted in the first instance upon the above information, insert here:—

(M) This certificate should be indorsed on his receipt for the prisoner, (No. 54), (T. 2).

"The matter of the above information is now substantiated before me, the said Justice, [or 'me, the said Police Magistrate, sitting at the said Police Court as aforesaid'], by the oath of the above-named C. D., [or L. M.], of —, in the said [Colony], [farmer]." C. D. [or D. E.]

Taken [and sworn] before me, the day and year and at the place above mentioned. J. S.

**2. Deposition on Charge or Complaint substantiated on a Warrant being granted on Disobedience to a Summons. (N) (Not in Jervis's Act).**

New South Wales } The matter of the within information [or complaint] was on this — day of —, 186—, substantiated before me the within-mentioned Justice, [or "the undersigned, one of Her Majesty's Justices of the Peace in and for the [Colony] of New South Wales"], at —, in the said Colony, by the oath of the within-named C. D., [or L. M.], of —, in the said Colony, [farmer].

C. D. [or L. M.]

Before me,

J. S.

**2 A. Information at the suit of an Informer. (Not in Jervis's Act).**

To wit. } Be it remembered, that on this — day of —, in the year of our Lord 186—, C. D., of —, in the Colony of —, [laborer], in his proper person cometh before me the undersigned, one of Her Majesty's Justices of the Peace in and for the said Colony, and now giveth me [or on oath, if so required] to understand and be informed that one A. B., of —, in the Colony of —, [laborer], within the space of — now last past, to wit, on the — day of —, at —, in the Colony aforesaid, did

[Here set out the offence. Some useful examples of statements of offences will be found in Chap. III. of this portion of this work].

contrary to the form of the Statute in such case made and provided, whereby and by force of the said Statute the said A. B. hath forfeited a sum of money not exceeding — pounds for the said offence, (the same being his [first] offence), to be paid and applied according to law; and thereupon the said C. D. prayeth judgment in the premises, and that the said A. B. may be caused to appear before the Justices aforesaid to answer the said information, and make his defence thereto.

\* \* Vide the asterisks at conclusion of Form 1, for the words to be inserted here where a warrant granted in the first instance.

Exhibited [and sworn] before me the day and year }  
and at the place above-mentioned, J. S. }

C. D.

**3. Information for a Second Offence. (O) (Not in Jervis's Act).**

[Proceed with offence complained of as in No. 1, to the conclusion, and

(N) Not required if original information or complaint was taken upon oath, according to the provisions of the Statutes giving cognizance of the offence or matter.

(O) Instead of averring the former conviction in the formal manner here shown, it may be open to doubt whether stating the previous conviction in general terms is not sufficient in the information, i. e., "the same being his [second] offence"; but an express and formal averment must be made in a conviction.



*then add*: And also that he the said A. B. heretofore and before the commission of the said last mentioned offence, to wit, on the — day of — last, at —, in the [Colony] aforesaid, was duly convicted before [one] of Her Majesty's Justices of the Peace in and for the said [Colony], for that he the said A. B., on &c., at &c., [*here describe the offence as in the first conviction*], contrary, &c.: And that the said A. B. was thereupon adjudged for his said last-mentioned offence to be imprisoned [*or as the case may be, stating correctly the terms of the former adjudication*].

4. *Information for a Third Offence.* (Not in Jervis's Act).

[*Proceed as in No. 3, adding thereto at the end the first offence committed, the last offence complained of then standing first in the information*].

5. *Information against an Aider or Abettor, with or without the Principal.* (Not in Jervis's Act).

[*Proceed with offence against the Principal as in No. 1, to the conclusion, and then add*]: And that F. G., of &c., was then and there present, ["wilfully," or as the Statute may be] aiding and abetting the said A. B. to do and commit the said offence, contrary, &c.

6. *Information against a Counsellor or Procurer.* (Not in Jervis's Act).

[*Proceed with offence against principal as in No. 1, to the conclusion, and then add*]: And that F. G., of &c., before the said offence was committed as aforesaid, to wit, on the — day of — aforesaid, at — [aforesaid], did ["wilfully," or as the Statute may be] counsel and procure the said A. B. to do and commit the said offence, contrary, &c.

7. *Summons to the Defendant upon an Information or Complaint.* (A.)

To A. B., of —, in the Colony of New South Wales, [*laborer*].

Whereas information hath this day been laid [*or complaint hath this day been made*] before the undersigned, one [*or two*] of Her Majesty's Justices of the Peace in and for the said Colony of —, for that you [*here state shortly the matter of the information or complaint*]: These are therefore to command you in Her Majesty's name to be and appear on the — day of — instant [*or next*], at — o'clock in the forenoon, at —, in the said Colony, before such Justices of the Peace for the said [Colony] as may then be there, to answer to the said information [*or complaint*], and to be further dealt with according to law.

Given under my hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid.

J. S. (L. S.)

8. *Deposition of the Constable or other Person of the Service of the Summons.* (Not in Jervis's Act).

[This Form will be found in Part I., "Justices, No. 1," p. 177, & see p. 431].

9. *Warrant where the Summons is disobeyed.* (B.)

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [Colony].

Whereas on the — day of — instant [*or last past*], information

was laid [*or complaint was made*] before the undersigned, one [*or two*] of Her Majesty's Justices of the Peace in and for the said [*Colony*] of —, for that A. B. [*&c., as in the summons*]: And whereas I [*or we*] then issued my [*or our*] summons unto the said A. B., commanding him in Her Majesty's name to be and appear on the — day of — instant [*or next*], at — o'clock in the forenoon, at —, in the said Colony, before such Justices of the Peace for the said [*Colony*] as might then be there, to answer to the said information [*or complaint*], and to be further dealt with according to law: And whereas the said A. B. hath neglected to be or appear at the time and place so appointed in and by the said summons, although it hath now been proved to me [*or us*] upon oath that the said summons hath been duly served upon the said A. B.: These are therefore to command you in Her Majesty's name forthwith to apprehend the said A. B., and to bring him [*or her*] before some one or more of Her Majesty's Justices of the Peace in and for the said [*Colony*], to answer to the said information [*or complaint*], and to be further dealt with according to law.

Given under my [*or our*] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [*Colony*] aforesaid.

J. S. (L. S.)

#### 10. *Warrant in the first instance.* (C.)

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [*Colony*].

Whereas information hath this day been laid before the undersigned, one [*or two*] of Her Majesty's Justices of the Peace in and for the said [*Colony*] of —, for that A. B. [*here state shortly the matter of the information*]; and oath being now made before me [*or us*] substantiating the matter of such information: These are therefore to command you in Her Majesty's name forthwith to apprehend the said A. B., and to bring him [*or her*] before some one or more of Her Majesty's Justices of the Peace in and for the said [*Colony*], to answer to the said information, and to be further dealt with according to law.

Given under my [*or our*] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)

#### 11. *Warrant of Committal for safe Custody during an Adjournment of the Hearing.* (D.)

To W. T., Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the Gaol at —, in the said Colony.

Whereas on the — day of — instant [*or last past*], information was laid [*or complaint was made*] before the undersigned, one [*or two*] of Her Majesty's Justices of the Peace in and for the said Colony of —, for that [*&c., as in the Summons*]: And whereas the hearing of the same is adjourned to the — day of — instant [*or next*], at — o'clock in the forenoon, at —, in the said [*Colony*], and it is necessary that the said A. B. should in the meantime be kept in safe custody: These are therefore to command you the said constable in Her Majesty's name forthwith to convey the said A. B. to the Gaol at —, in the said Colony,

and there deliver him [or her] into the custody of the Keeper thereof, together with this precept; and I [or we] hereby command you the said Keeper to receive the said A. B. into your custody in the said Gaol, and there safely keep him [or her] until the — day of — instant [or next], when you are hereby required to convey and have him [or her] the said A. B. at the time and place to which the said hearing is so adjourned as aforesaid, before such Justices of the Peace for the said Colony as may then be there, to answer further to the said information [or complaint], and to be further dealt with according to law.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186 —, at —, in the Colony aforesaid.

J. S. (L. S.)

12. *Recognizance for the Appearance of the Defendant where the Case is adjourned, or not at once proceeded with. (E.)*

— } Be it remembered, that on the — day of —, in the year  
 — } of our Lord 186 —, A. B., of —, in the Colony of New South  
 To wit. } Wales, [laborer], and L. M., of —, in the said Colony, [grocer],  
 came personally before the undersigned, one [or two] of Her Majesty's  
 Justices of the Peace in and for the said [Colony], and severally acknowledged themselves to owe to our Sovereign Lady the Queen the several sums following, that is to say: the said A. B. the sum of —, and the said L. M. the sum of —, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements, respectively, to the use of our said Lady the Queen, her heirs and successors, if he [or she] the said A. B. shall fail in the condition endorsed.

Taken and acknowledged, the day and year first above mentioned, at —, in the said [Colony], before me [or us], J. S.

The condition of the within-written recognizance is such, that if the said A. B. shall personally appear on the — day of — instant [or next], at — o'clock in the forenoon, at —, in the said [Colony], before such Justices of the Peace for the said [Colony] as may then be there, to answer further to the information [or complaint] of C. D. exhibited against the said A. B., and to be further dealt with according to law, then the said recognizance to be void, or else to stand in full force and virtue.

13. *Notice of such Recognizance to be given to the Defendant and his Surety.*

Take notice, that you A. B., of —, in the [Colony] of New South Wales, [laborer], are bound in the sum of —, and you, L. M., of —, in the said [Colony], [grocer], in the sum of —, that you A. B. appear personally on the — day of —, at — o'clock in the forenoon, at —, in the said [Colony], before such Justices of the Peace for the said [Colony] as shall then be there, to answer further to a certain information [or complaint] of C. D., the further hearing of which was adjourned to the said time and place; and unless you appear accordingly, the recognizance entered into by you A. B., and by L. M. as your surety, will forthwith be levied on you and him.

Dated this — day of —, 186—.

J. S.

14. *Certificate of Non-appearance to be indorsed on the Defendant's Recognizance.* (F.)

I [or we] hereby certify that the said A. B. hath not appeared at the time and place in the said condition mentioned, but therein hath made default, by reason whereof the within-written recognizance is forfeited.

J. S.

15. *Notice to the Complainant or Informant of Defendant's Apprehension, and of Day of Hearing.* (Not in Jervis's Act).

Court of Petty Sessions for the District of —, the — day of —, 186—, at —.

We beg to give you notice, that A. B., against whom a warrant was issued on your information [or complaint], has been apprehended and brought this day at the place above named, and ordered by a Justice to be brought up at the same place on — next, at — o'clock at noon, on the hearing of the said information [or complaint], when and where you are required to attend.

Yours, &c.,

E. F., Clerk of Petty Sessions.

To Mr. C. D. of —.

16. *Deposition that a Person is a material Witness.* (Not in Jervis's Act).

New South Wales, } The deposition of J. N., of —, in the [Colony] of New South Wales, [farmer], taken on oath before me the undersigned, one of Her Majesty's Justices of the Peace in and for the said [Colony], at —, in the same [Colony], this — day of —, 186—, who saith that E. F., of — aforesaid, [grocer], is likely to give material evidence on behalf of the prosecutor [or complainant, or defendant] in this behalf, touching the matter of the annexed [or within] information [or complaint]; and that this deponent verily believes that the said E. F. will not appear voluntarily for the purpose of being examined as a witness, [or, if a warrant be granted in the first instance, "without being compelled so to do"].

J. N.

Before me, J. S.

17. *Summons of a Witness.* (G. 1).

To E. F., of —, in the [Colony] of New South Wales, [laborer].

Whereas information was laid [or complaint was made] before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [&c., as in the summons]; and it hath been made to appear to me [or us] upon [oath] that you are likely to give material evidence on behalf of the prosecutor [or complainant, or defendant] in this behalf: These are therefore to require you to be and appear on the — day of — instant [or next], at — o'clock in the forenoon, at —, in the said Colony, before such Justices of the Peace for the said [Colony] as may then be there, to testify what you shall know concerning the matter of the said information [or complaint].\*

\* If a document is required also, insert here, [see 17 Vic., No. 39, s. 8]:

And you are further required to bring with you the following documents, viz., [here describe them shortly], which likewise appear to be material evidence in this behalf. (Ante, p. 264).

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)

18. *Deposition of Constable, or other Person, of Service of the last Summons.* (Not in Jervis's Act).

[*Proceed as in Form No. 8, Chap. I., and Part I., "Justices, No. 1," p. 177, adding at the conclusion*]: and at the said time tendered [or paid] to the said E. F. the sum of —, for his costs and expenses in that behalf.

19. *Warrant where a Witness has not obeyed a Summons.* (G. 2).

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [Colony].

Whereas information was laid [or complaint was made] before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [*dec., as in the summons*]: and it having been made to appear to me [or us] upon oath that E. F., of —, in the said [Colony], [laborer], was likely to give material evidence on behalf of the [prosecutor], I [or we] did duly issue my [or our] summons to the said E. F., requiring him [or her] to be and appear on the — day of — instant [or next], at — o'clock in the forenoon of the same day, at —, in the said Colony, before such Justices of the Peace for the said [Colony] as might then be there, to testify what he [or she] should know concerning the said A. B., or the matter of the said information [or complaint]:<sup>a</sup> And whereas proof hath been made before me [or us] upon oath, of such summons having been duly served upon the said E. F., and of a reasonable sum having been paid [or tendered] to him [or her] for his [or her] costs and expenses in that behalf: And whereas the said E. F. hath neglected to appear at the time and place appointed by the said summons, and no just excuse hath been offered for such neglect: These are therefore to command you to take the said E. F., and to bring and have him [or her] on the — day of — instant [or next], at — o'clock in the forenoon, at —, in the said Colony, before such Justices of the Peace for the said [Colony] as may then be there, to testify what he [or she] shall know concerning the matter of the said information [or complaint].

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid.

J. S. (L. S.)

20. *Warrant for a Witness in the first instance.* (G. 3).

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [Colony].

Whereas information was laid [or complaint was made] before the undersigned, one [or two] of her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [*dec., as in the summons*]: and it being made to appear before me [or us] upon oath that E. F., of —, in the said Colony, [laborer], is likely to give material evidence on behalf of the [prosecutor] in this matter, and it is probable that the said E. F. will not attend to give evidence without being compelled so to do: These are there-

fore to command you to bring and have the said E. F. before me [or us], on the — day of — instant [or next], at — o'clock in the forenoon, at —, in the said Colony, or before such other Justices of the Peace for the said [Colony] as may then be there, to testify what he [or she] shall know concerning the matter of the said information [or complaint].

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid.

J. S. (L. S.)

21. *Commitment of a Witness for refusing to be sworn or to give Evidence.*  
(G. 4).

To W. T., Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the [Gaol] at —, in the said Colony.

Whereas information was laid [or complaint was made] before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [&c., as in the summons]; and one E. F., now appearing before me [or us], such Justice as aforesaid, on the — day of —, at —, in the said Colony, and being required by me [or us] to make oath [or affirmation] as a witness in that behalf, hath now refused so to do [or, "being now here duly sworn as a witness in the matter of the said information [or complaint], doth refuse to answer certain questions concerning the premises which are now here put to him [or her]"], without offering any just excuse for such his [or her] refusal: These are therefore to command you the said constable to take the said E. F., and him [or her] safely to convey to the [Gaol] at — aforesaid, and there deliver him [or her] to the said Keeper thereof, together with this precept; and I [or we] do hereby command you the said Keeper of the said [Gaol] to receive the said E. F. into your custody in the said [Gaol], and there imprison him [or her] for such his [or her] contempt, for the space of — days, unless he [or she] shall in the meantime consent to be examined and to answer concerning the premises; and for your so doing this shall be your sufficient warrant.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid.

J. S. (L. S.)

22. *Information to ground a Summons or Warrant against a Witness not attending to give Evidence, (where the particular Statute imposes a Penalty for such neglect), in order to convict him.* (Not in Jervis's Act). (P)

[Proceed to the asterisk\* as in the form of information No. 1, ante, p. 450, then thus]: that information [&c., proceed as in No. 19, (G. 2), ante, to the asterisk\*, then]: that the said E. F. was served with a duplicate of such summons by this informant on the — day of —

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(P) It would appear that the punishment of imprisonment "for not exceeding seven days unless the witness shall in the meantime consent to be examined, and to answer concerning the premises," enacted by 11 & 12 Vic., c. 43, s. 7, would be cumulative upon such penalty. This information might be made by the constable who served the summons on the witness. (Oke F.) But see "Witness," Note (A), p. 423.

instant, personally, [or by leaving the same with N. Q. at the said E. F.'s usual place of abode], at —, in the said [Colony], [and, if the Statute requires a tender], and at the same time tendered [or paid] to the said E. F. the sum of — for his costs and expenses in that behalf, and that the said E. F. hath ["wilfully" or as the Statute may be] neglected [or refused] to appear at the time and place appointed by the said summons, and no just [or reasonable] excuse hath been offered for such neglect [or refusal], contrary, &c.

23. *Conviction thereon, where the Statutes require it.*

[Proceed as in either of the Forms, No. 30 (I. 1), or No. 31 (I. 2), post, according as the penalty is to be recovered, stating the offence as in the above information in the past tense].

24. *Commitment thereon.*

[This is easily framed from the Conviction (23)].

25. *The like Information as No. 22, ante, for refusing to be examined on Oath or Affirmation.* (q) (Not in Jervis's Act).

[Proceed to the asterisk\* in the form of Information No. 1, ante, p. 450, then thus]: That on the — day of — last, information was laid [or complaint was made] before J. L., Esquire, one of Her Majesty's Justices of the Peace in and for the said [Colony] of —, by C. D., of &c., that [&c., as in the summons to the defendant in the case]; that one E. F. appeared on this — day of —, before L. M., Esquire, one of Her Majesty's Justices of the Peace in and for the said [Colony], as a witness in that behalf, and, being required by the said last-mentioned Justice to make oath or affirmation as a witness, refused and still doth refuse so to do, [or "being then and there duly sworn as such witness, refused and still doth refuse to answer certain questions concerning the premises which were then and there put to him"], without offering any just excuse for such his refusal, contrary, &c.

26. *Conviction thereon.*

[The same as No. 23, ante, adapted to above Information, No. 25].

27. *Commitment thereon.*

[This is easily framed from the Information No. 25, and Conviction]. (r)

28. *Minutes of Proceedings at the Hearing, with Adjudication.* (s) (Not in Jervis's Act).

C. D. against A. B. — day of —, 18—, at N.

Before J. T. B. and J. D., Esquires.

The defendant appeared on a [warrant] granted by J. D. M., Esquire,

(q) In some cases, where the Statute allows it, the conviction might be immediate on the refusal, without an information or summons being previously taken.

(r) If no conviction is required by the particular Statute, the Commitment No. 21 (G. 4), ante, p. 457, may be easily adapted to a pecuniary penalty punishment.

(s) These minutes may be either written on a separate paper, signed by the convicting Justice or Justices, and annexed to the information, or on the back of the information or summons or warrant,—or in a separate book for that sole purpose.

charging him with assaulting and beating at L., on the 3rd instant, one C. D.

Defendant, on being asked what he has to say, pleads guilty, [or complainant on his oath saith —].

E. F., of —, [laborer], on his oath saith —, [or complainant does not appear, and defendant attends with his witnesses].

*Adjudications.*] 1. On dismissal.—*Dismissed*, with costs, viz., fees for summonses to two witnesses, 4s., two witnesses' attendance, 5s.=9s., to be paid [forthwith] or levied by distress, or, in default, imprisonment for fourteen days, unless costs of distress be paid.

2. Where imprisonment only.—*Convicted*: To be imprisoned with hard labor for [two] calendar months. Costs, 14s. 6d., to be paid forthwith or levied by distress, and, in default, imprisonment for fourteen days additional, and to pay costs of commitment, 18s. 6d.

3. Where a penalty.—*Convicted*: To pay penalty, 5s., damage [or value], 1s., and costs, 14s., forthwith [or on or before the 12th instant]: to be recovered by distress, and, in default, one calendar month's imprisonment with hard labor, unless sooner paid, with costs of distress.

[For the form of the terms of an adjudication on a complaint, vide Form No. 59, post, Minute of Order for Service, which will be similar].

#### 29. Warrant to remand a Defendant when apprehended. (H.)

To W. T., Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the [Gaol] at —, in the said [Colony].

Whereas information was laid [or complaint was made] before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [&c., as in the summons or warrant]: And whereas the said A. B. hath been apprehended under and by virtue of a warrant upon such information [or complaint], and is now brought before me [or us] as such Justice as aforesaid: These are therefore to command you the said constable in Her Majesty's name forthwith to convey the said A. B. to the [Gaol] at —, in the said Colony, and there to deliver him [or her] to the said Keeper thereof, together with this precept; and I [or we] do hereby command you the said Keeper to receive the said A. B. into your custody in the said [Gaol], and there safely keep him or [her] until — next, the — day of — [instant], when you are hereby commanded to convey and have him [or her] at —, in the said Colony, at — o'clock in the forenoon of the same day, before such Justices of the Peace of the said Colony as may then be there, to answer to the said information [or complaint], and to be further dealt with according to law.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid.

J. S. (L. S.)

#### 30. Conviction for a Penalty to be levied by Distress, and, in default of sufficient Distress, Imprisonment. (I. 1).

Be it remembered, that on the — day of —, in the year  
To wit. } of our Lord 186—, at —, in the said [Colony], A. B., of  
—, in the said Colony, [laborer], is convicted before the undersigned,



one [or two] of Her Majesty's Justices of the Peace for the said [Colony], for that he [or she] the said A. B. [*&c.*, *stating the offence, and the time and place when and where committed*]; and I [or we] adjudge the said A. B. for his [or her] said offence to forfeit and pay the sum of [*stating the penalty, and also the compensation, if any*], to be paid and applied according to law, and also to pay to the said C. D. the sum of —, for his [or her] costs in this behalf; and, if the said several sums be not paid forthwith [or on or before — next\*], I [or we] order that the same be levied by distress and sale of the goods and chattels of the said A. B., and, in default of sufficient distress,\* I [or we] adjudge the said A. B. to be imprisoned in the [Gaol] at —, in the said Colony, [*there to be kept to hard labor*] for the space of —, unless the said several sums, and all costs and charges of the said distress, [*and of the commitment and conveying of the said A. B. to the said Gaol*], shall be sooner paid.

Given under my [or our] hand and seal, the day and year first above mentioned, at —, in the Colony aforesaid. J. S. (L. S.)

\*• Or, where the issuing of a distress warrant would be ruinous to the defendant or his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks\*•, say: "then inasmuch as it hath now been made to appear to me [or us] that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family, [or "that the said A. B. hath no goods or chattels whereon to levy the said sums by distress"], I [or we] adjudge, &c.," as above, is the end.

### 31. Conviction for a Penalty, and, in default of Payment, Imprisonment. (I. 2).

To wit. } Be it remembered, that on the — day of —, in the year 186—, at —, in the said [Colony], A. B., of —, in the said Colony, [*laborer*], is convicted before the undersigned, one [or two] of Her Majesty's Justices of the Peace for the said Colony, for that he [or she] the said A. B. [*&c.*, *stating the offence, and the time and place when and where it was committed*]; and I [or we] adjudge the said A. B. for his [or her] said offence to forfeit and pay the sum of [*stating the penalty, and the compensation, if any*], to be paid and applied according to law, and also to pay to the said C. D. the sum of —, for his [or her] costs in this behalf; and, if the said several sums be not paid forthwith, [or on or before — next], I [or we] adjudge the said A. B. to be imprisoned in the [Gaol] at —, in the said [Colony], [*and there to be kept to hard labor*] for the space of —, unless the said several sums [and the costs and charges of conveying the said A. B. to the said Gaol] shall be sooner paid.

Given under my [or our] hand and seal, the day and year first above mentioned, at —, in the Colony aforesaid. J. S. (L. S.)

### 32. Conviction when the Punishment is by Imprisonment, &c. (I. 3).

To wit. } Be it remembered, that on the — day of —, in the year 186—, in the said [Colony], A. B., of —, in the said Colony, [*laborer*], is convicted before the undersigned, one [or two] of Her Majesty's Justices of the Peace for the said [Colony], for that he [or she] the said A. B. [*&c.*, *stating the offence, and the time and*

place when and where committed]; and I [or we] adjudge the said A. B. for his [or her] said offence to be imprisoned in the Gaol at —, in the said Colony, [and there kept to hard labor] for the space of —; and I [or we] also adjudge the said A. B. to pay the said C. D. the sum of —, for his [or her] costs in this behalf; and if the said sum for costs be not paid forthwith, [or on or before — next], then\* I [or we] order that the said sum be levied by distress and sale of the goods and chattels of the said A. B.; and, in default of sufficient distress in that behalf,\* I [or we] adjudge the said A. B. to be imprisoned in the said Gaol [and there kept to hard labor] for the space of —, to commence at and from the termination of his [or her] imprisonment aforesaid, unless the said sum for costs shall be sooner paid.

Given under my [or our] hand and seal, the day and year first above mentioned, at —, in the Colony aforesaid. J. S. (L. S.)

\*.\* Or, where the issuing of a distress warrant would be ruinous to the defendant or his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks\*.\*, say: "inasmuch as it hath now been made to appear to me [or us] that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family, [or, "that the said A. B. hath no goods or chattels whereon to levy the said sum for costs by distress"], I [or we] adjudge, &c."

### 33. Conviction on view of a Justice. (T) (Not in Jervis's Act).

New South Wales } Be it remembered, that on the — day of —, in the  
to wit. } year of our Lord 186—, I, G. H., Esquire, one of Her  
New South Wales, personally saw A. B., of —, in the said Colony of  
N. S. W., [here state the offence seen committed], contrary, &c. Whereupon  
it is considered and adjudged by [me] the said Justice that the said A. B.  
be convicted, and he is by me accordingly hereby convicted of his said  
offence, upon my own view as aforesaid, according to the form of the  
Statute aforesaid in that case made and provided; and I adjudge the said  
A. B. for his said offence [conclude as usual].

### 34. Adjudication for a joint Offence where the Penalty is severed among the Defendants. (Not in Jervis's Act).

And I adjudge the said A. B., E. F., and G. H. for their said offence to forfeit and pay the sum of [£5, the full penalty], to be paid and applied according to law, and also to pay to the said C. D. the sum of — for his costs in this behalf, in the following proportions, that is to say: the said A. B. for his said offence the sum of [£2, share of penalty], and the sum of — for costs; and the said E. F. for his said offence the sum of [£1, other part of penalty], and the sum of — for costs; and the said G. H. for his said offence the sum of [£2, remainder of penalty], and the sum of — for costs; and if the said several apportioned sums be not paid forthwith, [or on or before — next], by the said A. B., E. F., and G. H., respectively, I adjudge each of them, the said A. B., E. F., and G. H., who shall make default in that behalf, severally to be imprisoned in the

(T) This conviction is authorized in the case of Idle and Disorderly Persons, (s. 2 of Vagrant Act, ante, p. 416), and by s. 2 of Geo. II., c. 21, i. e., for Swearing, (ante, p. 400).

[*Gaol*] at —, in the said [*Colony*], [*and there to be kept to hard labor*] for the space of —; [*or, if imprisonment be different to each, say*]: I adjudge the said A. B., E. F., and G. H. to be severally imprisoned in the [*Gaol*] at —, in the said [*Colony*], [*and there severally to be kept to hard labor*] for the following periods respectively, that is to say:— the said A. B. for the space of —; the said E. F. for the space of —; and the said G. H., for the space of —; unless the said several sums so adjudged to be paid by the person so making default shall be sooner paid.

35. *Adjudication upon several Defendants for a several Offence on one Conviction, where the penalty is the same to each.*

New South Wales } Be it remembered, that on the — day of —, in the  
to wit. } year of our Lord 186—, at —, in the said Colony of  
New South Wales, A. B., E. F., and G. H. are convicted before the undersigned, [*two*] of Her Majesty's Justices of the Peace in and for the said Colony, for that they the said A. B., E. F., & G. H. did [*&c., stating the offence*]; and we adjudge the said A. B. for his said offence to forfeit and pay the sum of —, to be [respectively] paid and applied according to law, and also to pay to C. D. the sum of — for his costs in respect of the said A. B. in this behalf; and if the said several sums be not paid forthwith, [*or on or before the — day of —*], we adjudge the said A. B. to be imprisoned in the *Gaol* at —, in the said [*Colony*], [*there to be kept to hard labor*] for the space of —, unless the said several sums [and the costs and charges of the commitment and conveying of the said A. B. to the said common *Gaol*] shall be sooner paid; and we adjudge the said E. F. for his said offence to forfeit and pay [*&c., as above, repeating the like adjudication against each defendant convicted*].

N.B.—*When the punishment is by imprisonment, and not by penalty, and the same punishment is assigned to each offender, the adjudication in the Form (I. 3), No. 32, (ante, p. 460), may adjudge all the defendants "for their said offence, to be severally imprisoned in the &c.", but the adjudication of costs in that case must, if they are ordered, be separate.*

36. *Adjudication upon several Defendants for a several Offence in one Conviction where the Penalty is different on each. (Not in Jervis's Act).*

[*This will be precisely the same Form as 35, supra*].

37. *Conviction for a second or subsequent Offence. (Not in Jervis's Act).*

[*This will be in either of the foregoing Forms of Convictions, adding before the first adjudication the following averment of the previous conviction*]:—

And whereas it is now duly proved before us the said Justices that the said A. B. was heretofore, to wit, on the — day of —, in the year of our Lord 186—, duly convicted before —, one of Her Majesty's Justices of the Peace in and for the said [*Colony*], for that he the said A. B. did on the — day of —, at —, in the said [*Colony*], [*state the offence as in the former conviction*]; and the said A. B. was thereupon adjudged, for his said last-mentioned offence, to [*state the adjudication*]

*correctly*): And we adjudge the said A. B., for his said [second or third] offence, of which he has been so convicted this day as aforesaid, to forfeit [etc., proceeding to the end as in the ordinary way].

37 (A). *Indorsement in backing a Warrant. (K.)*

To wit. } Whereas proof on oath hath this day been made before me, one of Her Majesty's Justices of the Peace in and for the said [Colony] of —, that the name of J. S. to the within warrant subscribed is of the handwriting of the Justice of the Peace within mentioned: I do therefore hereby authorize W. T., who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other Peace Officers of the said [Colony], to execute the same within the said last mentioned [Colony], and to bring the said A. B., if apprehended within the same [Colony], before me, or before some other Justice or Justices of the Peace of the same [Colony], to be dealt with according to law.

Given under my hand, this — day of —, 186—.

J. L.

38. *Order for Payment of Money to be levied by Distress, and, in default of distress, Imprisonment. (K. 1).*

To wit. } Be it remembered, that on the — day of —, in the year of our Lord 186—, complaint was made before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of New South Wales, for that [stating the facts entitling the complainant to the order, with the time and place when and where they occurred]; and now at this day, to wit, on the — day of —, at —, in the said Colony, the parties aforesaid appear before me [or us] the said Justice, [or "the said C. D. appears before me [or us] the said Justice, but the said A. B., although duly called, doth not appear by himself [or herself], his [or her] Counsel or Attorney, and it is now satisfactorily proved to me [or us] on oath that the said A. B. has been duly served with the summons in this behalf which required him [or her] to be and appear here at this day before such Justices of the Peace for the said [Colony] as should now be here, to answer the said complaint, and to be further dealt with according to law"]; and now, having heard the matter of the said complaint, I [or we] do adjudge the said A. B. to pay to the said C. D. the sum of — forthwith, [or on or before the — day of — next, or as the Statute may require], and also to pay the said C. D. the sum of — for his [or her] costs in this behalf; and if (v) the said several sums be not paid forthwith, [or on or before the — day of — next],\* I [or we] hereby order that the same be levied by distress and sale of the goods and chattels of the said A. B.; and, in default of sufficient distress in that behalf,\* I [or we] adjudge the said A. B. to be imprisoned in the [Gaol] at —, in the said [Colony], [and there kept to hard labor] for the space

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(v) *Add here, with reference to the minute of the order required by sec. 17 to be served: "Upon a copy of this order being served upon the said A. B., either personally or by leaving the same for him at his last or most usual place of abode."*

of —, unless the said several sums, and all costs and charges of the said distress, [and of the commitment and conveying of the said A. B. to the said Gaol], shall be sooner paid.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)

\*• Or, where the issuing of a distress warrant would be ruinous to the defendant or his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks\*•, say: "then inasmuch as it hath now been made to appear to me [or us] that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family, [or "that the said A. B. hath no goods or chattels whereon to levy the said sums by distress"], I [or we] adjudge, &c., as above, to the end.

39. *Order for Payment of Money, and, in default of payment, Imprisonment.* (K. 2).

Be it remembered, that on the — day of —, in the year of our Lord 186—, complaint was made before the undersigned, one To wit. } [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [stating the facts entitling the complainant to the order, with the time and place when and where they occurred]; and now at this day, to wit, on the — day of —, at —, in the said [Colony], the parties aforesaid appear before me [or us] the said Justice, [or "the said C. D. appears before me [or us] the said Justice, but the said A. B., although duly called, doth not appear by himself [or herself], his [or her] Counsel or Attorney, and it is now satisfactorily proved to me [or us] on oath that the said A. B. has been duly served with the summons in this behalf which required him [or her] to be and appear here on this day, before such Justice of the Peace for the said [Colony] as should now be here, to answer the said complaint, and to be further dealt with according to law"]; and now, having heard the matter of the said complaint, I [or we] do adjudge the said A. B. to pay to the said C. D. the sum of — forthwith, [or on or before — next, or as the Statute may require], and also to pay to the said C. D. the sum of —, for his [or her] costs in this behalf; and if (w) the said several sums be not paid forthwith, [or "on or before the — day of — next"], I [or we] adjudge the said A. B. to be imprisoned in the [Gaol] at —, in the said [Colony], [there to be kept to hard labour] for the space of —, unless the said several sums [and the costs and charges of conveying the said A. B. to the said [Gaol]] shall be sooner paid.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L. S.)

40. *Order for any other matter where the disobeying of it is punishable with Imprisonment.* (K. 3).

Be it remembered, that on the — day of —, in the year of our Lord 186—, complaint was made before the undersigned, one To wit. } [or two] of Her Majesty's Justices of the Peace in and for the

(w) *Vide* Note (v), *ante*, Form (K. 1), for an addition to be made here.

said [Colony] of —, for that [stating the facts entitling the complainant to the order, with the time and place when and where they occurred]; and now at this day, to wit, on the — day of —, at —, in the said [Colony], the parties aforesaid appear before me [or us] the said Justice, [or “the said C. D. appears before me [or us] the said Justice, but the said A. B., although duly called, doth not appear by himself [or herself], his [or her] Counsel, or Attorney, and it is now satisfactorily proved to me upon oath that the said A. B. has been duly served with the summons in this behalf which required him [or her] to be and appear here at this day before such Justices of the Peace for the said [Colony] as should now be here, to answer to the said complaint, and to be further dealt with according to law”]; and now, having heard the matter of the said complaint, I [or we] do therefore adjudge the said A. B. to [here state the matter required to be done]; and if, upon copy of a minute of this order being served upon the said A. B., either personally or by leaving the same for him [or her] at his [or her] last or most usual place of abode, he [or she] shall neglect or refuse to obey the same, in that case I [or we] adjudge the said A. B., for such his [or her] disobedience, to be imprisoned in the [Gaol] at —, in the said [Colony], [there to be kept to hard labor] for the space of —, [unless the said order be sooner obeyed, if the Statute authorize this]; and I [or we] do also adjudge the said A. B. to pay to the said C. D. the sum of — for his [or her] costs in this behalf; and, if the said sum for costs be not paid forthwith, [or on or before — next], I [or we] order the same to be levied by distress and sale of the goods and chattels of the said A. B., [and, in default of sufficient distress in that behalf, I [or we] adjudge the said A. B. to be imprisoned in the said [Gaol] [and there to be kept to hard labor] for the space of —, to commence at and from the termination of his [or her] imprisonment aforesaid, unless the said sum for costs shall be sooner paid].

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid. J. S. (L. s.)

#### 41. Order of Dismissal of an Information or Complaint. (L.)

Be it remembered, that on the — day of —, in the year of our Lord 186—, information was laid [or complaint was made] To wit, } before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [§c., as in summons to defendant]; and now at this day, to wit, on the — day of —, at —, in the said [Colony], (x) both the said parties appear before me [or us] in order that I [or we] should hear and determine the said information [or complaint], [or the said A. B. appeareth before me [or us], but the said C. D., although duly called, doth not appear]; whereupon the matter of the said information [or complaint] being by me [or us] duly considered, [\*it manifestly appears to me [or us] that the said information [or complaint] is not proved, and\*] I [or we] do therefore dismiss the same, and do adjudge

\* If the informant or complainant do not appear, these words between the asterisks may be omitted.

(x) If at an adjournment, insert here: “To which day the hearing of this case hath been duly adjourned, of which the said C. D. had due notice.”

that the said C. D. do pay to the said A. B. the sum of — for his [or her] costs incurred by him [or her] in his [or her] defence in this behalf; and if (Y) the said sum for costs be not paid forthwith, [or on or before —], I [or we] order that the same be levied by distress and sale of the goods and chattels of the said C. D.; and in default of sufficient distress in that behalf, I [or we] adjudge the said C. D. to be imprisoned in the [Gaol] at — in the said [Colony], [and there kept to hard labor] for the space of —, unless the said sum for costs, and all costs and charges of the said distress, [and of the commitment and conveying of the said C. D. to the said Gaol], shall be sooner paid.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid.

J. S. (L.S.)

#### 42. Certificate of Dismissal. (M.)

I [or we] hereby certify, That an information [or complaint] preferred by C. D., of —, in the Colony of New South Wales, [grocer], against A. B., of —, in the said Colony, [laborer], for that [etc as in the summons], was this day considered by me [or us], one [or two] of Her Majesty's Justices of the Peace in and for the [Colony] of —, and was dismissed by me [or us] [with costs].

Dated this — day of —, 186—.

J. S.

#### 43. Minute of Order of Dismissal for Service under Sect. 17. (Not in Jarvis's Act). (z)

No. — of N.

At a Petty Sessions of Her Majesty's Justices of the Peace for the Colony of New South Wales, holden at N. in the said [Colony], the — day of —, 186—,

C. D., Complainant,  
against

A. B., Defendant,

It is adjudged and ordered\* that the information [or complaint] in

\* Referred to in Form No. 59, post.

this case for [state shortly the charge], be dismissed, with costs, the said C. D. not appearing, [or the said information [or complaint] not being proved]; and that the said C. D. shall forthwith [or on or before the — day of — next] pay to the said A. B. the sum of [nine] shillings for his costs incurred in his defence: to be recovered by distress, and in default the said C. D. to be imprisoned for —, unless sooner paid [with the costs of distress] [and of conveyance to Gaol].

J. B.,

Clerk to the Justices.

(Y) A minute of this order should be served, pursuant to section 17, and some mention made of it in the body, as in No. 40, (K. 3), supra; insert therefore here: "Upon a copy of a minute of this order being served upon the said C. D., either personally or by leaving the same for him at his last or most usual place of abode."

(z) This minute should be issued in duplicate, and the time and mode of serving indorsed upon it by the person who served it, and retained by the Clerk to the Justices.

44. *Warrant of Distress upon a Conviction for a Penalty.* (N. 1).

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [Colony].

Whereas A. B., late of —, in the said Colony, [laborer], was on this day of — [or on the — day of — last past] duly convicted before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of —, for that [stating the offence as in the conviction], and it was thereby adjudged that the said A. B. should for such his offence forfeit and pay [£c., as in the conviction], and should also pay to the said C. D. the sum of — for his [or her] costs in that behalf; and it was thereby ordered that, if the said several sums should not be paid [forthwith], the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was thereby also adjudged that, in default of sufficient distress, the said A. B. should be imprisoned in the [Gaol] at —, in the said [Colony], [and there kept to hard labor] for the space of —, unless the said several sums, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said [Gaol], should be sooner paid: And whereas the said A. B. being so convicted as aforesaid, and being [now] required to pay the said sums of — and —, hath not paid the same, or any part thereof, but therein hath made default:\*

These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said A. B.; and if, within the space of — days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising by such sale unto —, the Clerk of the Justices of the Peace for the [district] of —, in the said [Colony], that he may pay and apply the same as by law is directed, and may render the overplus, if any, on demand, to the said A. B.; and, if no such distress can be found, then that you certify the same unto me [or us], to the end that such further proceedings may be had thereon as to the law doth appertain. (A)

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid. J. S. (L.S.)

45. *Commitment forthwith upon a like Conviction, where the Distress would be ruinous, or on Defendant confessing he has no Goods.* (Not in Jervis's Act).

To the Chief Constable of —, and to all other Peace Officers of —, and to the Keeper of the [Gaol] at —, in the said [Colony] of N. S. Wales.  
 New South Wales } Whereas A. B., late of —, in the said [Colony], was on  
 this day duly convicted before the undersigned, [one] of Her  
 to wit. } Majesty's Justices of the Peace in and for the said [Colony],

(A) If the defendant is detained until the return of this warrant, a verbal order to that effect will do, or the following may be inserted at this place: "And whereas the said A. B. not having given sufficient security by recognizance or otherwise to my satisfaction for his appearance on the return of this warrant, I do hereby further order you to keep and detain the said A. B. in safe custody until the said return shall be made, and then bring him before me the said Justice.



for that in the said A. B. did in the — day of — at — in the [Colony] aforesaid, *where he did the offence*, contrary to the laws of the Colony in such case made and provided, and I was thereby adjudged that the said A. B. should for such offence forfeit and pay *here does he forfeit and the compensation of any*, and should also pay to the said — the sum of — for his costs in that behalf: and it was likewise ordered that if the said several sums should not be paid forthwith, then warrant to be made to appear in — that the issuing of a warrant of distress in this behalf should be returned in the said A. B. and the family of that the said A. B. shall be goods or chattels whosoever to pay the said sums of distress, I was thereby also adjudged that the said A. B. should be imprisoned in the [gaol] at — in the said [Colony], *and there kept in hard labor* for the space of —, unless the said several sums (and the costs and charges of the commitment and conveying him of the said A. B. to the said [gaol]) should be sooner paid: And whereas the said A. B. being so committed as aforesaid, and being now required to pay the said sums of — and —, hath not paid the same, or any part thereof, but therein hath made default: There are therefore to command you the said constable of — to take the said A. B. and him secretly coming to the [gaol] at — aforesaid, and there to deliver him to the Keeper thereof, together with this precept: and I do hereby command you the said Keeper of the said [gaol] to receive the said A. B. into your custody in the said [gaol], there to imprison him *[and keep him to hard labor]* for the space of —, unless the said several sums (and the costs and charges of the commitment and conveying him to the said [gaol], amounting to the further sum of —) shall be sooner paid: and for your so doing this shall be your sufficient warrant.

Given under [my] hand and seal this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid. J. S. [L. S.]

May be placed in the margin:—

Fine.....  
Damage.....  
Costs.....  
Commitment and conveyance to gaol.....

Total.....£

#### 46. Recognizance of a Defendant to appear on the Return of a Distress Warrant for Penalty and Costs. (Not in Jervis's Act).

Proceed as in the Form of Recognizance No. 12, (E.), ante, p. 451, altering the condition thereof as follows:—

Instead of "to answer, &c." say: "being the day appointed for the return of a certain warrant of distress this day issued by me the said Justice, to levy on the goods and chattels of the said A. B. certain sums adjudged to be paid by him and to be levied; and to be further dealt with, &c., &c." The notice of this Recognizance would be similar to the Form No. 13, ante, p. 454.

#### 47. Warrant of Distress upon an Order for the Payment of Money. (N. 2). To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said [Colony].

Whereas, on the — day of — instant [or last past], a complaint

was made before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] of—, for that [§c., as in the order], and afterwards, to wit, on the — day of —, at—, in the said Colony, the said parties appeared before me [or us, or as in the order], and thereupon, having considered the matter of the said complaint, I [or we] adjudge the said A. B. [to pay to the said C. D. the sum of — on or before the — then next, and also] to pay to the said C. D. the sum of — for his [or her] costs in that behalf; and I [or we] thereby ordered that, if (B) the said several sums should not be paid on or before the said — day of — then next, the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was adjudged that, in default of sufficient distress in that behalf, the said A. B. should be imprisoned in the [Gaol] at —, in the said [Colony], [and there kept to hard labor] for the space of —, unless the said several sums, and all costs and charges of the distress, [and of the commitment and conveying of the said A. B. to the said Gaol], should be sooner paid: And whereas the time in and by the said order appointed for the payment of the said several sums of — and — hath elapsed, but the said A. B. hath not paid the same, or any part thereof, but therein hath made default :\*(c) These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said A. B.; and if, within the space of — days after the making of such distress, the said last-mentioned sums, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale unto —, the Clerk of the Justices of the Peace for the [district] of —, in the said [Colony], that he may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and, if no such distress can be found, then that you certify the same unto me [or us], to the end that such proceedings may be had therein as to the law doth appertain. (D)

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid.

J. S. (L.S.)

48. *Indorsement in Backing a Warrant of Distress.* (N. 3).

Whereas proof upon oath hath this day been made before me — [or us], one [or two] of Her Majesty's Justices of the Peace in To wit. ) and for the said [Colony] of —, that the name of J. S. to the within warrant subscribed is of the handwriting of the Justice of the Peace within mentioned: I [or we] do therefore authorize W. T., who bringeth to me [or us] this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and

(B) *There should be inserted here, pursuant to sec. 17, and as in Nos. 60, 62: "Upon a copy of the minute being duly served upon the said A. B., either personally or by leaving the same for him at his last or most usual place of abode."*

(C) *Here insert: "Although a copy of the minute of the said order was duly served upon the said A. B."*

(D) *Add here the Form of direction to detain the defendant till the return of this distress warrant, as given in Note (r) to Form No. 44, ante.*

also all constables and other Peace Officers of the said [Colony] of —, to execute the same within the said Colony.

Given under my [or our] hand and seal, this — day of —, 186—. J. B.

49. *Constable's Return to Warrant of Distress.* (N. 4).

I, W. T., Constable of —, in the Colony of New South Wales, do hereby certify to J. S., Esquire, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony], that by virtue of this warrant I have made diligent search for the goods and chattels of the within-mentioned A. B., and that I can find no sufficient goods or chattels of the said A. B. whereon to levy the sums within mentioned.

Witness my hand, this — day of —, 186—.

W. T.

50. *Warrant of Commitment for Want of Distress.* (N. 5).

To the Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the Gaol at —, in the said [Colony].

Whereas [§c., as in the foregoing distress warrant (N. 1), No. 44, to the asterisk\*, and then thus]: And whereas afterwards, on the — day of —, in the year aforesaid, I [or we] the said Justice issued a warrant to the constable of —, in the said [Colony], commanding him to levy the said sums of — and — by distress and sale of the goods and chattels of the said A. B.: And whereas it appears to me [or us], as well by the return of the said constable to the said warrant of distress as otherwise, that the said constable hath made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sums above-mentioned could be found: These are therefore to command you the said constable of —, in the said [Colony], to take the said A. B., and him [or her] safely to convey to the [Gaol] at — aforesaid, and there deliver him [or her] to the said Keeper, together with this precept; and I [or we] do hereby command you the said Keeper of the said [Gaol] to receive the said A. B. into your custody in the said [Gaol], there to imprison him [or her], [and keep him [or her] to hard labor] for the space of —, unless the said several sums, and all the costs and charges of the said distress, [and of the commitment and conveying of the said A. B. to the said Gaol], amounting to the further sum of —, shall be sooner paid unto you the said Keeper; and for your so doing this shall be your sufficient warrant.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [Colony] aforesaid.

J. S. (L. S.)

51. *Commitment of a Defendant for a consecutive Period, where convicted on the same Day of two or more Offences.* (Not in Jervis's Act).

To the Chief Constable of —, and all other Peace Officers of —, and to the Keeper of the common Gaol at —, in the [Colony] of New South Wales.

New South } Whereas A. B., late of —, in the [Colony] of —,  
Wales } was on this day duly convicted before the undersigned,  
to wit } [one] of Her Majesty's Justices of the Peace for the said

[*Colony*], for that he the said A. B. did on the — day of —, at —, in the said [*Colony*], [*here state the offence*], contrary to the form of the Statute in such case made and provided; and it was thereby adjudged that the said A. B. for [his] said offence\* should forfeit and pay the sum of [*here state the penalty, and compensation, if any*], and also pay to C. D. the sum of — for [his] costs in that behalf; and it was thereby further adjudged and ordered that, if the said several sums should not be paid forthwith, *the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was thereby also adjudged that, in default of sufficient distress, the said A. B. should be imprisoned in the [Gaol] at —, in the said [Colony], [and there kept to hard labor] for the space of —, to commence at and from the termination of a certain other term of imprisonment for an offence of which the said A. B. is this day duly convicted, and now stands committed under a certain other warrant, signed by the said Justice, and dated this day, and delivered to the said Keeper herewith, [unless the said several sums and all costs and charges of the said distress] should be sooner paid: And whereas the time in and by the said conviction appointed for the payment of the said several sums hath elapsed, and the said A. B., being now required to pay the same, hath not paid the same, or any part thereof, but therein hath made default; and inasmuch as it hath now been made to appear to me, the said Justice, that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B., [or, "that the said A. B. hath no goods or chattels whereon to levy the said sums by distress"]*: These are therefore to command you the said constable of — to take the said A. B., and [him] safely to convey to the [Gaol] at — aforesaid, and there to deliver him to the Keeper thereof, together with this precept; and I do hereby command you the said Keeper of the said [Gaol] to receive the said A. B. into your custody in the said [Gaol], there to imprison [him] [*and keep [him] to hard labor*] for the space of —, to commence at and from the termination of the said other term of imprisonment above mentioned, [unless the said several sums, and the costs and charges of the said distress, amounting to the sum of —, shall be sooner paid]; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [*Colony*] aforesaid. J. S. (L. S.)

MEM. to be placed in margin :—

£ s. d.

|                                          |  |
|------------------------------------------|--|
| Fine .....                               |  |
| Value or damage .....                    |  |
| Costs .....                              |  |
| Charges of distress .....                |  |
| [Commitment and conveyance to Gaol]..... |  |

Total.....£

N.B.—Where imprisonment only is adjudged, omit the portions within the brackets [ ] from the asterisk\*, and the Form will be applicable. If a penalty adjudged, it will suit without alteration. Where the penalty is not to be recovered by distress, erase the words which are in italics.

52. Commitment upon a Conviction for a second or subsequent Offence, adapted to where Imprisonment only adjudged, or where a Penalty

*imposed and Imprisonment in default of Payment.* (Not in Jervis's Act).

To the Chief Constable of —, and all other Peace Officers of —, and to the Keeper of the Gaol at —, in the [Colony] of New South Wales. New South } Whereas A. B., late of —, in the said [Colony], [la-  
Wales } borer], was this day duly convicted before the undersigned,  
to wit. } [one] of Her Majesty's Justices of the Peace in and for the  
said [Colony], for that he the said A. B., on the — day of —, at —, in the said [Colony], did [here state the offence], contrary to the form of the Statute in such case made and provided: And whereas it is duly proved before [me] the said Justice that the said A. B. was heretofore, to wit, on the — day of —, in the year of our Lord 186—, duly convicted before J. P., Esquire, one of Her Majesty's Justices of the Peace in and for the said [Colony], for that he the said A. B., on the — day of —, in the year of our Lord 186—, at —, in the said [Colony], did [here state the former offence as in the conviction proved], contrary, &c., and the said A. B. was thereupon adjudged for his said last-mentioned offence to [state the terms of the adjudication of imprisonment or penalty]; and it was thereby adjudged by [me] the said Justice first named, that the said A. B. for his said [second] offence, of which he has been this day so convicted as aforesaid, [A should forfeit and pay the sum of [here state the penalty, and compensation, if any], and also to pay to the said C. D., the prosecutor, the sum of — for his costs in this behalf; and it was thereby further adjudged that, if the said several sums should not be paid forthwith, the said A. B. B] should be imprisoned in the [Gaol] at —, in the said [Colony], [and there kept to hard labor] for the space of —, [C "unless the said several sums, and the costs and charges of the commitment and conveying the said A. B. to the said [Gaol],] should be sooner paid: And whereas the said A. B., being now required to pay the said several sums, hath not paid the same, or any part thereof, but therein hath made default" D]: These are therefore to command you the said constable of — to take the said A. B. and him safely convey to the [Gaol] at — aforesaid, and there to deliver him to the Keeper thereof, together with this precept; and [I] do hereby command you the said Keeper of the said [Gaol] to receive the said A. B. into your custody in the said [Gaol], there to imprison him [and keep him to hard labor] for the space of —, [E "unless the said several sums, [and the costs and charges of the commitment and conveying him to the said Gaol],] amounting to the further sum of —, shall be sooner paid" F]; and for your so doing this shall be your sufficient warrant.

Given under [my] hand and seal, this — day of —, in the year of our Lord 186 —, at —, in the [Colony] aforesaid. J. S. (L.S.)

N.B.—Where imprisonment only is adjudged, omit the portions between the letters A to B, C to D, E to F, and the Form will be applicable. If a penalty is adjudged, it will suit without alteration.

### 53. Warrant of Commitment upon a Conviction for a Penalty in the First Instance. (O. 1).

To the Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the [Gaol] at —, in the said [Colony].  
Whereas A. B., late of —, in the [Colony] of New South Wales,

[*laborer*], was on this day duly convicted before the undersigned, one [*or two*] of Her Majesty's Justices of the Peace in and for the said [*Colony*], for that [*stating the offence as in the conviction*]; and it was thereby adjudged that the said A. B. for his [*or her*] said offence should forfeit and pay the sum of [*&c., as in the conviction*], and should pay to the said C. D. the sum of — for his [*or her*] costs in that behalf; and it was thereby further adjudged that, if the said several sums should not be paid [*forthwith*], the said A. B. should be imprisoned in the [*Gaol*] at —, in the said [*Colony*], [*and there kept to hard labor*] for the space of —, unless the said several sums, [*and the costs and charges of conveying the said A. B. to the said [Gaol]*], should be sooner paid: And whereas the time in and by the said conviction appointed for the payment of the said several sums hath elapsed, but the said A. B. hath not paid the same, or any part thereof, but therein hath made default: These are therefore to command you the said constable of — to take the said A. B., and him [*or her*] safely to convey to the [*Gaol*] at — aforesaid, and there to deliver him [*or her*] to the Keeper thereof, together with this precept; and I [*or we*] do hereby command you the said Keeper of the said [*Gaol*] to receive the said A. B. into your custody in the said [*Gaol*], there to imprison him [*or her*] [*and keep him [or her] to hard labour*] for the space of —, unless the said several sums, [*and the costs and charges of conveying him to the said [Gaol], amounting to the further sum of —*], shall be sooner paid; and for your so doing this shall be your sufficient warrant.

Given under my [*or our*] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the [*Colony*] aforesaid.

J. S. (L. s.)

MEM. to be placed in margin of Form:—

£ s. d.

|                                       |  |
|---------------------------------------|--|
| Fine .....                            |  |
| Value or damage .....                 |  |
| Costs .....                           |  |
| [Commitment and conveyance to Gaol].. |  |
| Total....£                            |  |
| [Each] ..                             |  |

54. *Warrant of Commitment on an Order in the First Instance. (O. 2).*  
To the Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the [*Gaol*] at —, in the said Colony.

Whereas, on the — day of — instant, [*or last past*], complaint was made before the undersigned, one [*or two*] of Her Majesty's Justices of the Peace in and for the said Colony, for that [*&c., as in the order*], and afterwards, to wit, on the — day of —, at —, in the said Colony, the parties appeared before me [*or us*] the said Justice, [*or as it may be in the order*], and thereupon, having considered the matter of the said complaint, I [*or we*] adjudged the said A. B. to pay to the said C. D. the sum of — on or before the — day of — then next, and also to pay to the said C. D. the sum of — for his [*or her*] costs in that behalf; and I [*or we*] also thereby adjudged that if (E) the said several sums

(E) *There should be inserted here, pursuant to sec. 17, and as in Nos. 60, (P. 2), 62, (P. 4): "Upon a copy of the minute of the order being duly served upon the said A. B. either personally or by leaving the same for him at his last or most usual place of abode."*

ed in the [Gaol] at —, in the said [Colony],  
 for the space of —, unless the said several  
 charges of the commitment and conveying of the  
 [Gaol] should be sooner paid: And whereas,  
 aute of the said order was duly served upon  
 B. hath made default in payment of the said  
 paid the same, or any part thereof: These are  
 Form No. 45, ante].

endant to appear at the Return of the Distress  
 ice thereof. (Not in Jervis's Act).  
 similar to Form No. 46, ante, p. 468].

ment upon an Order for Want of Distress. (Not  
 in Jervis's Act).

\* in Form No. 55, supra, then thus]: the same  
 ess and sale of the goods and chattels of the said  
 gged that, in default of sufficient distress in that  
 should be imprisoned in the [Gaol] at —, in the  
 re to be kept to hard labor] for the space of —,  
 sums, and all costs and charges of the distress [and  
 nd conveying of the said A. B. to the said [Gaol],  
 : And whereas, although, after the making of the  
 the minute thereof was duly served upon the said A.  
 did not then pay, nor hath he paid, the said sum of  
 thereof, but therein hath made default: And whereas  
 — day of —, in the year aforesaid, I, the said Jus-  
 ot to the constable of —, commanding him to levy the  
 and — by distress and sale of the goods and chattels  
 : And whereas it appears to me, as well by the return of  
 to the said warrant of distress as otherwise, that the  
 hath made diligent search for the goods and chattels of the  
 that no sufficient distress whereon to levy the sums above  
 d be found: These are therefore [ &c., conclude as in Form  
 ), ante].

of Commitment on a Conviction where the Punishment is  
 by Imprisonment. (P. 1)

of Constable of —, in the Colony of New South Wales, and  
 to the Keeper of the Gaol at —, in the said [Colony].  
 as A. B., late of —, [laborer], was this day duly convicted  
 s undersigned, one [or two] of Her Majesty's Justices of the Peace  
 or the said [Colony], for that (u) [stating the offence as in the  
 n], and it was thereby adjudged that the said A. B. for his [or

the conviction takes place after the expiration of the time limited for laying  
 on after the commission of the offence, and as it would otherwise seem  
 was not prosecuted in time, insert here: "within — [the time  
 laying the information] next before the laying of the information  
 conviction is founded, to wit, on &c., at &c."

the same, it was adjudged that in such case the said A. B. for such his [or her] disobedience should be imprisoned in the [Gaol] at —, in the said [Colony], [and there kept to hard labor] for the space of —, [unless the said order should be sooner obeyed]: And whereas it is now proved to me [or us] that, after the making of the said order, a copy of the minute thereof was duly served upon the said A.B., but he [or she] then refused [or neglected] to obey the same, and hath not as yet obeyed the said order: These are therefore to command you the said constable of — to take the said A. B., and him [or her] safely to convey to the [Gaol] at — aforesaid, and there to deliver him [or her] to the Keeper thereof, together with this precept; and I [or we] do hereby command you the said Keeper of the said [Gaol] to receive the said A. B. into your custody in the said [Gaol], there to imprison him [or her], [and keep him [or her] to hard labor] for the space of —; and for so doing this shall be your sufficient warrant.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid.

J. S. (L.S.)

61. *Warrant of Distress for Costs upon a Conviction where the Offence is punishable by Imprisonment.* (P. 3).

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said Colony.

Whereas A.B., of —, in the said [Colony], [laborer], was, on the — day of — instant [or last past], duly convicted before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said [Colony] for that [stating the offence as in the conviction], and it was thereby adjudged that the said A. B. for his [or her] said offence should be imprisoned in the [Gaol] at —, in the said [Colony], [and there kept to hard labor] for the space of —; and it was also thereby adjudged that the said A. B. should pay to the said C. D. the sum of — for his [or her] costs in that behalf; and it was thereby ordered that, if the said sum of — for costs should not be paid [forthwith], the same should be levied by distress and sale of the goods and chattels of the said A.B.; [and it was adjudged that, in default of sufficient distress in that behalf, the said A. B. should be imprisoned in the said [Gaol], [and there kept to hard labor] for the space of —, to commence at and from the termination of his [or her] imprisonment aforesaid, unless the said sum for costs, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B., to the said [Gaol], should be sooner paid]: And whereas the said A. B., being so convicted as aforesaid, and being required to pay the said sum of — for costs, hath not paid the same, or any part thereof, but therein hath made default:\* These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said A. B.; and if, within the space of — days next after the making of such distress, the said last-mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale to —, the Clerk of the Justices of the Peace for the district of —, in the said [Colony], that he may pay the same as by law



directed, and may render the surplus [if any] on demand to the said A. B. ; and, if no such distress can be found, then that you certify the same unto me [or us], to the end that such proceedings may be had therein as to the law doth appertain.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186—, at —, in the Colony aforesaid. J. S. (L.S.)

62. *Warrant of Distress for Costs upon an Order where the Disobeying of the Order is punishable with Imprisonment. (P. 4).*

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said Colony.

Whereas, on the — day of — instant [or last past], complaint was made before the undersigned, one [or two] of Her Majesty's Justices of the Peace in and for the said Colony of —, for that [&c., as in the order], and afterwards, to wit, on the — day of —, in the said [Colony], the said parties appeared before me [or us] as such Justice as aforesaid, [or as it may be in the order], and thereupon, having considered the matter of the said complaint, I [or we] adjudged the said A. B. to [&c., as in the order]; and that if, upon a copy of the minute of that order being served upon the said A. B., either personally or by leaving the same for him [or her] at his [or her] last or most usual place of abode, he should neglect or refuse to obey the same, I [or we] adjudged that in such case the said A. B. for such his disobedience should be imprisoned in the [Gaol] at —, in the said [Colony], [and there kept to hard labor] for the space of —, [unless the said order should be sooner obeyed]; and I [or we] thereby also adjudged the said A. B. to pay to the said C. D. the sum of — for his [or her] costs in that behalf; and I [or we] ordered that, if the said sum for costs should not be paid [forthwith], the same should be levied of the goods and chattels of the said A. B. ; [and, in default of sufficient distress in that behalf], I [or we] thereby adjudged that the said A. B. should be imprisoned in the said [Gaol], [and there kept to hard labor] for the space of —, to commence at and from the termination of his [or her] imprisonment aforesaid, unless the said sum for costs, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said [Gaol], should be sooner paid : And whereas, after the making of the said order, a copy of the minute thereof was duly served upon the said A. B., but the said A. B. did not then pay, nor hath he [or she] paid, the said sum of — for costs, or any part thereof, but therein hath made default :\* These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said A. B. ; and if, within the space of — days next after the making of such distress, the said last-mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale to —, the Clerk of the Justices of the Peace for the [district] of —, in the said [Colony], that he may pay the same as by law directed, and may render the overplus [if any] on demand to the said A. B. ; and, if no such distress can be found, then that you certify the same unto me [or us], to the end that such proceedings may be had therein as to the law doth appertain.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186 —, at —, in the Colony aforesaid.

J. S. (L. S.)

N.B.—*Vide Forms Nos. 48, (N. 3), and 49, (N. 4), ante, pp. 469 & 470, —Indorsement in backing a Distress Warrant, and the Constable's Return of Nulla Bona.*

63. *Warrant of Commitment for want of Distress for the Costs.* (P. 5).  
To the Chief Constable of —, in the Colony of New South Wales, and to the Keeper of the Gaol at —, in the said Colony.

Whereas [*&c.*, as in No. 61 or 62, to the asterisk\*, and then thus]: And whereas afterwards, on the — day of —, in the year aforesaid, I [or we] the said J. S. issued a warrant to the constable of —, in the said [Colony], commanding him to levy the said sum of — for costs, by distress and sale of the goods and chattels of the said A. B.: And whereas it appears to me [or us], as well by the return of the said constable to the said warrant of distress as otherwise, that the said constable hath made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sum above mentioned could be found: These are therefore to command you the said constable of — to take the said A. B., and him [or her] safely convey to the [Gaol] at — aforesaid, and there deliver him [or her] to the Keeper thereof, together with this precept; and I [or we] do hereby command you the said Keeper of the said [Gaol] to receive the said A. B. into your custody in the said [Gaol], there to imprison him [or her], [*and keep him [or her] to hard labor*] for the space of —, (1) unless the said sum, and all costs and charges of the said distress, [*and of the commitment and conveying of the said A. B. to the said [Gaol]*], amounting to the further sum of —, shall be sooner paid unto you the said Keeper; and for your so doing this shall be your sufficient warrant.

Given under my [or our] hand and seal, this — day of —, in the year of our Lord 186 —, at —, in the Colony aforesaid.

J. S. (L.S.)

MEM. to be placed in the margin of this Form:—

£ s. d.

Costs ordered.....

Distress warrant and charges of distress.....

[Commitment and conveyance to gaol] .....

Total.....£

64 *Warrant of Distress for Costs upon an Order for Dismissal of an Information or Complaint.* (Q. 1).

To the Chief Constable of —, in the Colony of New South Wales, and to all other Peace Officers in the said Colony.

Whereas, on the — day of — instant [or last past], information

(1) *Although this imprisonment by the 19th sec. may be directed to commence at the termination of that which the defendant is then undergoing for the offence, there is no mention made of it in this statutory Form; as in the conviction (I. 3), No. 32, ante, p. 460), or the recital of its adjudication upon which it is founded, it might be added here: "to commence at and from the termination of the imprisonment aforesaid, which the said A. B. is now undergoing under the said conviction [or order]."*

68. *Certificate of Clerk of the Peace that the Costs of an Appeal are not paid.* (R.)

Office of the Clerk of the Peace for ———, in and for  
the Colony of New South Wales.

[*Title of the Appeal*].

I hereby certify, That at a Court of General Quarter Sessions of the Peace holden at ———, in and for the said [*Colony*], on the ——— day of ——— instant [*or last past*], an appeal by A. B. against a conviction [*or order*] of J. S., Esquire, one [*or two*] of Her Majesty's Justices of the Peace for the said [*Colony*], came on to be tried, and was then heard and determined, and the said Court of General Quarter Sessions thereupon ordered that the said conviction [*or order*] should be confirmed [*or quashed*], and that the said [*appellant*] should pay to the said [*respondent*] the sum of ——— for his [*or her*] costs incurred by him [*or her*] in the said appeal, and which sum was thereby ordered to be paid to the Clerk of the Peace at ———, in the said [*Colony*], on or before the ——— day of ——— instant [*or next*], to be by him handed over to the said [*respondent*]; and I further certify that the said sum for costs has not, nor has any part thereof, been paid in obedience to the said order. Dated the ——— day of ———, 186 —.

G. H.,  
Clerk of the Peace.

69. *Warrant of Distress for Costs of an Appeal against a Conviction or Order.* (S. 1).

To the Chief Constable of ———, in the Colony of New South Wales, and to all other Peace Officers in the said Colony.

Whereas [*&c.*, as in the Warrants of Distress (N. 1, 2) *ante*, to the end of the statement of the conviction or order, and then thus]: And whereas the said A. B. appealed to the Court of General Quarter Sessions of the Peace holden at ———, in and for the said [*Colony*], against the said conviction [*or order*], in which appeal the said A. B. was the appellant, and the said C. D. [*or J. S.*, Esquire, the Justice of the Peace who made the said conviction (*or order*)], was the respondent, and which said appeal came on to be tried, and was heard and determined, at the last General Quarter Sessions of the Peace for the said [*Colony*], holden at ———, in and for the said [*Colony*], on the ——— day of ——— instant [*or last past*], and the said Court of General Quarter Sessions thereupon ordered that the said conviction [*or order*] should be confirmed [*or quashed*], and that the said [*appellant*] should pay to the said [*respondent*] the sum of ——— for his [*or her*] costs incurred by him [*or her*] in the said appeal, which said sum was to be paid to the Clerk of the Peace for ———, in the said [*Colony*], on or before the ——— day of ———, 186 —, to be by him handed over to the said [*C. D.*]: And whereas the said Clerk of the Peace for ———, in and for the said [*Colony*], hath, on the ——— day of ——— instant [*or last past*], duly certified that the said sum for costs had not then been paid: (\*) These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said [*A. B.*]; and if, within the space of ——— days next after the making of such distress, the said last-mentioned sum, together with the reasonable charges of taking and keeping the said

71. *Account of the Clerk of the Justices at Petty Sessions, and of the Keeper of the Gaol or House of Correction. (T.)*  
 MONTHLY RETURN to Her Majesty's Justices of the Peace at the Petty Sessions of the Peace for the [District] of —, in the Colony of New South Wales, assembled on the — day of —, 186—, of fines, penalties, and sums of money received by the Clerk of the said Court, [or "by the Keeper of the Gaol" or "House of Correction," at —, in the said Colony], and how applied, from the — day of —, 186—, to the — day of —, 186—.

| Name of Party convicted. | Date. | Offence. | Costs. | Amount thereof paid. | Fine. | Amount thereof paid. | Amount of Fine, and how applied. | Punishment when Fine not paid. | Names of convicting Magistrates. | Reasons of Non-payment or other Observations. |
|--------------------------|-------|----------|--------|----------------------|-------|----------------------|----------------------------------|--------------------------------|----------------------------------|-----------------------------------------------|
|                          |       |          |        |                      |       |                      |                                  |                                |                                  |                                               |

(Signed) \_\_\_\_\_  
 Clerk to the said Court [or "Keeper of the above Gaol" or "House of Correction".]

72. *Register of Convictions and Orders under 11 & 12 Vict., c. 43. (o)*

| No. (r) | Date. | Defendant's Name, &c. | Complainant or Informer's Name, &c. | Offence &c. | Terms of Adjudication. | Justices adjudicating. | Justices enforcing. | Amount received, from whom, and when. (q) | Fines, &c., how applied. |                    |    | Reasons of Non-payment or other Observations. |
|---------|-------|-----------------------|-------------------------------------|-------------|------------------------|------------------------|---------------------|-------------------------------------------|--------------------------|--------------------|----|-----------------------------------------------|
|         |       |                       |                                     |             |                        |                        |                     |                                           | For                      | Otherwise applied. |    |                                               |
|         |       |                       |                                     |             |                        |                        |                     |                                           | £                        | s.                 | d. |                                               |

(o) This is intended as an improvement upon the Statutory Form, No. 71 (T.), *supra*, so as to show more clearly all the particulars required to be shown by s. 31 of 11 & 12 Vict., c. 43. If kept in a book, it would answer the twofold purpose of a "Minute Book, or Register of Convictions and Orders," as a ready reference to previous convictions of offenders, and a preparatory Form for the Monthly Return (No. 71) to the Justices.

(p) A number should be indorsed upon the information or complaint, or the documents in each case, in the order they are adjudicated upon.

(q) As the Clerk would only receive the full amount adjudged to be paid, and within the time limited, nothing less than the total fine or sum and costs would be entered here.

## CHAPTER III.

## STATEMENTS OF OFFENCES, FOR GENERAL USE.

*The name of the offender, as well as the date of and place of committing the offence, has been omitted throughout these Forms, for the sake of brevity, and keeping the compilation within a proper limit. The necessary addition, [i.e., "A. B., of &c., on the — day of —, at —, in the said Colony, did, &c.," or "for that he the said A. B., on &c., at &c., did &c."], must be read as if inserted at the commencement of each statement. The words "contrary, &c." at the conclusion of each, signify "contrary to the form of the Statute in such case made and provided."*

*Abduction.*

9 G. IV., c. 31, s. 19, (page 1).—1. *Of a Woman on account of her Fortune*—did, feloniously and from motives of lucre, take away and detain a certain woman named E. F. against her will, with intent her the said E. F. to marry, [or defile, or to cause to be married or defiled by one F. G., or by some person whose name is unknown], she the said E. F. at the time she was so taken away and detained by the said A. B. then having a certain present and absolute legal interest in certain real and personal property,

[or being the heiress presumptive to a person having an interest in certain real property],

[or being the next of kin to a person having an interest in certain personal property],

contrary, &c.

*Id.*, s. 20, (page 2).—2. *Of a Girl under Sixteen Years of Age*—did unlawfully take and cause to be taken E. D. out of the possession and against the will of C. D., her father, [or mother, or who then had the lawful care or charge of her], she the said E. D. being then an unmarried girl under the age of sixteen years, to wit, of the age of [fourteen] years, contrary to, &c.

See "*Women*," *post*.

*Abortion.*

1 Vic., c. 85, s. 6, (page 2).—1. *Administering Poison to procure*—did unlawfully and feloniously administer to [or cause to be taken by] one E. F., a large quantity of a certain poison [or noxious thing unknown] called —, to wit, one ounce of —, with intent then and thereby to procure the miscarriage of the said E. F., contrary to, &c.

2. *Using Instrument with same intent*—on, &c., did unlawfully and feloniously use a certain instrument [or "a certain instrument to — unknown"] called a —, with intent [&c., as in No. 1, *supra*].

*Accessory.*

(Page 2).—1. *Principal in the second degree*.—[After stating offence of the principal ~~in~~ the first degree, proceed thus]: That E. F., on the day and year aforesaid, feloniously was present aiding, abetting, and assisting the said A. B. to do and commit the [felony] aforesaid, [contrary, &c.]

2. *Accessory before the fact with principal*.—[After charging the principal with the offence, proceed thus]: That E. F., before the said felony was committed in form aforesaid, to wit, on &c., did feloniously incite and procure the said A. B. to commit the said felony in manner and form aforesaid, [contrary, &c.]

7 G. IV., c. 64, s. 9.—3. *Accessory before the fact, as for a substantive felony*.—[Same as preceding Form, concluding, "contrary to the form of the Statute, &c." The principal, if unknown, may be described as "a certain person [or certain persons] to &c. unknown.

4. *Accessory after the fact with principal*.—[After charging the principal with the offence, proceed thus]: and that E. F., well knowing the said A. B. to have committed the said felony in form aforesaid, afterwards, to wit, on the day and year aforesaid, did feloniously receive, harbour, and maintain him the said A. B., [contrary, &c.]

Under 13 Vic., No. 7, s. 2.—5. *Accessory after the fact, as for a substantive felony*.—[Same as preceding Form, concluding]: "contrary to the form of the Statute, &c." The principal, if unknown, may be described as "a certain person [or certain persons], to &c. unknown."

#### Accusing of Crime.

1 Vic., c. 87, s. 4; 10 & 11 Vic., c. 66, s. 2, (page 3).—1. *With a view of extorting Money, &c.*—did accuse one C. D. [or threaten one C. D. to accuse him] of having committed a certain crime now punishable by law with death [or transportation, to wit, —],

[or assaulted one L. M. with intent to commit a rape upon her; or to commit a certain infamous crime, to wit, —; or attempted or endeavoured to commit a rape upon (Ann, the wife of the said A. B., or as the case may be)],

[or with having committed a certain infamous crime, to wit, the abominable crime of buggery], with the view and intent then and thereby to extort and gain money [or as the case may be] from the said C. D. [or one E. F.], contrary, &c.

\* \* If the threat was by letter, vide "Letter, Threatening," post; if money extorted, see "Sodomy," post.

#### Affray.

1 Hawk., c. 63, s. 2, (page 5).—1. *Two or more fighting, to the terror of the People*—did unlawfully make an affray in a certain public street and highway there, called —, to the great terror and disturbance of Her Majesty's subjects then and there being.

#### Agents.

7 & 8 G. IV., c. 29, s. 49, (page 5).—1. *Embezzling Stock, Interest, &c.*—being a Banker and Agent, [or as the case may be], was entrusted by one C. D., for safe custody, [or for the special purpose of —], with a certain promissory note, drawn by one E. F., for the payment of twenty pounds, without any authority to sell, negotiate, transfer, or pledge the same; and the said A. B., afterwards in violation of good faith, and contrary to the object and purpose for which the said promissory note was so entrusted to him as aforesaid, did unlawfully sell, negotiate, transfer,

and convert to his own use and benefit [*or as the case may be*] the said promissory note, contrary &c.

*Animals, Cruelty to.*

14 Vic., No. 40, (page 5).—1. A Form of Conviction is given in s. 15 of the Statute.

*Id.*, s. 2.—2. *Beating, Ill-treating, &c., or causing same*—did cruelly beat [*or ill-treat, over-drive, abuse, or torture*], [*or cause or procure to be cruelly beaten (or ill-treated, over-driven, abused, or tortured)*], a certain animal, to wit, a horse, [*or mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or domestic animal*], by then and there [*here describe the ill-treatment, &c., as "violently beating the same about the head and ears with a large stick"*], contrary to the provisions of a certain Act passed in the fourteenth year of the reign of Her present Majesty, intituled an "Act for the more effectual Prevention of Cruelty to Animals," [*or of a certain Act of the fourteenth year of Her present Majesty, Number forty*].

*Id.*, s. 2.—3. *Keeping Cockpit or place for Bull-baiting, &c.*—did keep [*or use or act in the management of*] a certain place, to wit, a pit there for the purpose of fighting [*or baiting*] bulls, [bears, badgers, dogs, cocks], [*or did permit [or suffer] a certain place, to wit, a pit [or room] there to be used for the purpose, &c.*], [*or did encourage [or aid or assist] by then and there [describe defendant's act] at the fighting [or baiting] of a certain bull [&c.] there, being fought in a certain place, to wit, a yard there, then kept and used for the purpose of fighting, &c., as above*], contrary, &c. (R)

*Id.*, s. 3.—4. *Persons guilty of Cruelty, and thereby doing Damage*—did, by cruelly beating [*or ill-treating, over-driving, abusing, or torturing*] a certain animal, to wit, an ox [*or as the case may be*], do certain damage and injury to the said ox, to wit, [*describe the injury*], to the amount of —, [*or thereby cause certain damage and injury to be done to one E. F. there being, [or to certain property of one E. F. there, to wit, six panes of glass], to the amount of —*], contrary, &c.

N.B.—*To the adjudication in the form of conviction given by the Act, may be added the following*:—"such sum being ascertained and determined by [me] by way of compensation to the said E. F. for the said damage and injury so sustained by him as aforesaid."

*Id.*, s. 4, (page 6).—5. *Improperly conveying Animals*—did convey [*or carry, or cause to be conveyed or carried*] certain animals, to wit, ten oxen, in [*or upon*] a certain vehicle, to wit, a —, in such a manner [*or position*], to wit, [*here describe the manner*], as to subject the said oxen to unnecessary pain and suffering, contrary, [*&c., as in Form No. 2, supra*].

*Id.*, s. 14, (page 6).—6. *Summons to Proprietor of Public Vehicles to*

(B) I take this opportunity of correcting an omission in Part I., page 6, *supra*:—By s. 2 of this Act. any person in any manner encouraging, aiding, or assisting at the fighting or baiting of any bull, &c., is liable to a fine not exceeding £5: recoverable as offence 1. I may add that, by a recent decision, (*Clarke v. Hague*, 29 L. J. M. C., 105), this last offence can only be committed in a place kept or used for the purpose of fighting and baiting, &c., as is mentioned in the first part of the section. See offence 3.

*produce the Driver, &c.*]—This should be in the usual form of summons, Ch. II., No. 7, *ante*, p. 452, reciting the complaint made against the driver to the Justice as follows: Whereas complaint hath this day been made before the undersigned, one of Her Majesty's Justices of the Peace in and for the said [Colony], that A. B., of —, then being the driver [or conductor] of a certain stage carriage, [or cart, &c.], did, on the — day of —, at —, in the said —, [here describe the offence of the driver], contrary, &c.; and that you the said E. F. are the proprietor [or owner] of such stage carriage [or such cart, &c.]: These are therefore to command you in Her Majesty's name to produce the said A. B., the said driver, so that he be and appear on, &c., [conclude as in general Form, No. 7 of Ch. II., p. 452].

14 *Vic.*, No. 40, s. 14.—7. *Order for Payment by the Driver*.—This seems to be necessary. The general Form, No. 39, Ch. II., *ante*, p. 464, and the commitment, No. 54, Ch. II., *ante*, p. 473, will apply.

*Id.*—8. *Proprietor refusing to produce Driver*—that E. F., of &c., on the — day of — last, then being the Proprietor [or owner] of a certain stage carriage [or cart, &c.], hereinafter mentioned, was duly summoned by J. S., Esquire, one of Her Majesty's Justices of the Peace in and for the said [Colony], to produce one A. B., of &c., so that he be and appear here on this day, before such Justices of the Peace for the said [Colony] as might then be here, to answer to a certain complaint made before the said Justice against the said A. B., and to be further dealt with according to law, for that he the said A. B., on the — day of —, at — aforesaid, then being the driver [&c., state offence as in Form No. 6, *supra*]; but the said E. F. hath now here failed to produce, and hath not produced, the said A. B., the said driver, without any satisfactory excuse allowed by me the said Justice, contrary [&c., as in Form No. 2, *ante*].

9. *General Forms to be used in enforcing the Convictions*.—(No. 31, *ante*, p. 460, where a penalty imposed, or No. 32, *ante*, p. 460, where imprisonment only adjudged); commitment, No. 53, *ante*, p. 472; or commitment, &c., for costs, Nos. 61, 62, 63, *ante*, pp. 477—479.

#### Arson.

1 *Vic.*, c. 89, s. 2, (page 20).—1. *Dwelling-house, Person being therein*—on &c., did unlawfully, maliciously, and feloniously set fire to a certain dwelling-house of [the said] C. D., situate, &c., one E. D. being then, to wit, at the time of the committing of the felony aforesaid, in the said dwelling-house, contrary, &c.

*Id.*, s. 3, (page 20).—2. *Church or Chapel*—on &c., did unlawfully, maliciously, and feloniously set fire to a certain church,

[or to a certain chapel for the religious worship of persons dissenting from the united Church of England and Ireland, to wit, called the — chapel],

situate, &c., contrary, &c.

*Id.*, (page 20).—3. *House, Stable, &c.*—on &c., did unlawfully, maliciously, and feloniously set fire to a certain dwelling-house, [or stable, coach-house, outhouse, warehouse, shop, office, mill, malthouse, hopoast, barn, or granary, or to a certain building or erection, to wit, a —, used in carrying on the trade or manufacture of —], situate, &c.



*Id.*, s. 4.—4. *Ship, &c., or casting same away with intent to Murder, &c.*—on &c., did unlawfully, maliciously, and feloniously set fire to [or cast away, or destroy by certain means, to wit, —] a certain ship called the [City of Sydney], then being the property of one C. D. and others, with intent thereby then feloniously, wilfully, and of his the said A. B.'s malice aforethought, to murder and kill one E. F., then being in the said ship, [or whereby the life of one E. F.; or several persons, then being in the said ship, was endangered], contrary, &c.

9 & 10 Vic., c. 25, s. 7, (page 21).—5. *Attempting to set fire to any Building, Vessel, Stack, &c.*—did unlawfully, maliciously, and feloniously attempt to set fire to a certain building, to wit, a farm building, called —, [or vessel, or mine, to wit, a coal mine],

[or to a certain stack of wheat, or steer of wood, or to certain vegetable produce, to wit, —], the property of [the said] C. D., and in the occupation of the said A. B. [or C. D. or E. F.], then and there situate,\* [if thought necessary, describe how, as — by then and there throwing a certain ball composed of tinder, rag, and explosive substance, [or as the case may be], then and there lighted and on fire, into and upon the said building, or upon certain straw near to or composing the roof of the said building (or as the case may be)], with intent thereby then to injure the said C. D.,

[or to defraud a certain Insurance Company, called the Phoenix Fire Insurance Company], contrary, &c.

*Id.*, s. 6, (page 21).—6. *Throwing explosive Substance near to any Building, with intent to destroy*—did unlawfully, maliciously, and feloniously place [or throw in, into, upon, against, or near] a certain building, to wit, a —, certain gunpowder [or explosive substance, to wit, —], with intent thereby then and there to destroy [or damage] the said —,

[or certain machinery, working tools, fixtures, goods, or chattels, to wit, —, then being therein], contrary, &c.

See further, "Malicious Injuries," post.

16 Vic., No. 17, s. 6, (page 21).—7. *Setting Fire to a Railway, &c., Stations, or Warehouse, &c.*—on &c., did wilfully, maliciously, and feloniously set fire to a certain station, [or engine-house, warehouse, or building, to wit, —], situate, &c., then and there belonging and appertaining to a certain railway [or dock, canal, or navigation] called —, and then being the property of the — [Railway] Company, contrary, &c.

#### Assault.

9 G. IV., c. 31, s. 27, (page 24).—1. *Common Assault or Battery*—did unlawfully assault and beat [or assault only] one [or the said] C. D., contrary, &c.

2. *Certificate of Dismissal of Complaint*.—[This would be as the general Form, Ch. II., No. 42, ante, p. 466, but in the plural number, and adding at the conclusion]: as we deemed the offence not proved, [or we found the assault and battery to have been justified, or we found the assault to have been so trifling as not to merit any punishment].

3. *General Form to be used in enforcing the Conviction*, Ch. II., No. 31, *ante*, p. 460]; Commitment, Form, Ch. II., No. 53, *ante*.

18 Vic., No. 9, s. 1, (page 25).—4. *Assault on Women or Children*—did unlawfully assault and beat a certain woman, [or female child, or male child, not exceeding the age of fourteen years, to wit, of the age of — years], named C. D., contrary, &c.

The Forms of *Conviction* and *Commitment* in Jervis's Act, 11 & 12 Vic., c. 43, [see Ch. II.] (s) are applicable; but the following variations of the adjudication, where recognizance, &c., for the good behaviour, &c., is required, seem necessary:—

5. In the *Convictions*, Ch. II., Form No. 31 or 32, *ante*, p. 460, insert after the word "convicted" at the commencement, these words: "in pursuance of the Statute of the eighteenth year of Her Majesty's reign, No. 9"; and if recognizance required, say in the adjudication, after the term of imprisonment: "And we do also adjudge that the said A. B. shall be bound by his own recognizance in the sum of — pounds, to keep the peace and be of good behaviour towards Her Majesty and all her liege people, and especially towards the said C. D., for the space of — calendar months from the expiration of the said sentence."

18 Vic., No. 9, (page 25)—6. In the *Commitments*, Ch. II., No. 53, *ante*, p. 475, or Ch. II., No. 53, p. 472, make the same additions as last shown for the *Conviction*, and, if recognizance required, add the following direction to the Gaoler before the words, "and for your so doing, &c.":—"And you the said Keeper are further commanded, at the expiration of the said sentence to keep the said A. B. in your custody in the said [Gaol] for the further space of — calendar months, unless such recognizance shall be sooner entered into."

N.B.—If the defendant enter his recognizance before he is taken to gaol, the indorsement to that effect should be made on the *Commitment*, which may be somewhat like this: "I certify that the within-named defendant has entered into the recognizance within required of him, to take effect from the expiration of the term of imprisonment firstly within mentioned.—J. S., J. P."

1 Vic., c. 85, s. 4., (page 25).—7. *Stabbing, &c., with intent to maim, resist apprehension, disable, &c.*—did feloniously, with a certain gun, then and there loaded with gunpowder and divers leaden shot, shoot at and against one C. D.,

[or with a certain knife, which he, the said A. B., in his right hand then had and held, stab, cut, and wound one C. D.],

[or did, by drawing the trigger of a certain loaded fire-arm, to wit, —, or by —, attempt to discharge the said — at and against one C. D.], with intent in so doing then and thereby to maim [or disfigure or disable] the said C. D.],

[or to do some grievous bodily harm to the said C. D.],

[or to resist and prevent the lawful apprehension or detainer of him the said A. B., or of one E. F.],

contrary, &c.

(s) See *ex parte Allison*, (24 L. J. M. C., 73; 10 Exch., 561).

16 Vic., No. 17, s. 4, (page 26).—8. *Misdemeanor in Stabbing, &c., or inflicting grievous Bodily Harm*—on &c., did unlawfully and maliciously stab and wound one [or the said] C. D.,

[or did unlawfully and maliciously inflict upon one [or the said] C. D. grievous bodily harm],  
contrary, &c.

1. Vic., c. 85, s. 5, (page 26).—9. *Sending explosive substances, or throwing corrosive fluid, with intent to burn, &c.*—did unlawfully, maliciously, and feloniously send to [or deliver to, or cause to be taken and received by] one C. D. a certain explosive substance, [or dangerous or noxious thing], to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent, in so doing, then and thereby to burn [or maim, or disfigure, or disable, or do some grievous bodily harm to] the said C. D., and whereby the said C. D. was then and there grievously burnt [or as the case may be].

10.—[or did unlawfully, maliciously, and feloniously cast upon [or throw upon or apply to one C. D., by then and there —] one C. D. half-a-pint of a certain corrosive fluid and destructive matter, called oil of vitriol, with intent, [&c., as in No. 9], contrary, &c.

*Id.*, c. 87, s. 6, (page 26).—11. *With intent to rob*—did feloniously assault one [or the said] C. D., with intent then to rob the said C. D., and feloniously to steal, take, and carry away the moneys, goods, and chattels of the said C. D., contrary, &c.

[If armed, see "Larceny"].

*Com. Law*, (page 27).—12. *Common Assault and Battery*—on &c., did unlawfully make an assault upon one C. D., and did then unlawfully beat and ill-treat him.

13. *Assault occasioning actual Bodily Harm*—on &c., did make an assault upon one C. D., and did then unlawfully beat, wound, and ill-treat the said C. D., and did thereby then occasion actual bodily harm to the said C. D., contrary, &c.

N.B.—The introduction of the averment as to actual bodily harm in an information is to enable *hard labor* to be added to the imprisonment; see s. 29 of 16 Vic., No. 18. The prisoner may be convicted on this count, even although the offence amount to a felony; see *Id.*, s. 12; (see *R. v. Button*, 11 Q. B., 929).

9 G. IV., c. 31, s. 25, (page 27).—14. *With intent to carnally know a Girl under Ten Years of Age*—was then and there guilty of a certain misdemeanor, to wit, that he the said A. B., on the day and year and at the place aforesaid, did make an assault upon one C. D., an infant, under the age of ten years, with intent then and there unlawfully and feloniously carnally to know and abuse, contrary, &c.

*Id.*, (page 27).—15. *With intent to commit a Rape*—did unlawfully make an assault upon one C. D., with intent her the said C. D. then against her will to ravish and carnally know, contrary, &c.

*Id.*, (page 27).—16. *An Indecent Assault*—on &c., did unlawfully and indecently assault one C. D., and did unlawfully and indecently, and against the will of her the said C. D., [state what he did], and did then otherwise ill-treat and ill-use the said C. D., contrary, &c.

*Id.*, (page 27).—17. *On Constable*—did unlawfully assault one [or the

said] C. D., he the said C. D. being then a Peace Officer, to wit, a constable of —, and then being in the execution of his duty as such constable, and did then beat, wound, and ill-treat the said C. D. so being in the due execution of his duty as aforesaid, contrary, &c.

9 *G. IV.*, c. 31, s. 25, (page 27).—18. *Assault with intent to prevent lawful apprehension of the Party assaulting*—on &c., did make an assault upon one C. D., and did then beat, wound, and ill-treat him, with intent in so doing then and thereby to resist and prevent the lawful apprehension of him the said A. B. for a certain offence, of which he the said A. B. was then liable to be apprehended by the said C. D., that is to say, for then feloniously stealing money, the property of the said C. D., from the person of the said C. D., contrary, &c.

*Attempts to Murder, &c.*

1 *Vic.*, c. 85, s. 2, (page 28).—1. *Administering Poison, &c., Stabbing, or causing bodily injury, with intent to murder*—did feloniously administer to [or cause to be taken by] one C. D., one ounce weight of a certain poison [or destructive thing unknown] called —,

[or, with a certain knife which he then held, stab, or cut, or wound one C. D.],

[or assault one C. D., or a child of tender years, to wit, of the age of —, and did feloniously knock the head of the said C. D. against a —, and did thereby then cause unto one C. D. a certain bodily injury, dangerous to life, to wit, —],

with intent then and thereby feloniously, wilfully, and of his malice aforethought, to kill and murder the said C. D., contrary, &c.

7 *W. IV.*, & 1 *Vic.*, c. 85, s. 3.—2. *Attempting to administer Poison, or shooting at, or attempting to drown, suffocate, &c., with intent to murder*—did feloniously and unlawfully attempt to administer to one C. D. a large quantity of a certain deadly poison [or destructive thing] called —, to wit, — drachms of the said —, [or feloniously shoot with a certain [pistol], loaded with powder and divers leaden shot, at and against one C. D.], [or did present, point, and level at and against one C. D., certain loaded arms, to wit, a pistol, then loaded with gunpowder and one leaden bullet, and did then, by drawing the trigger of the said pistol, [or by —, as the case may be], feloniously attempt to discharge the same at one C. D.], [or feloniously attempt to drown [or suffocate, or strangle] one C. D., [an infant of tender years, to wit, of the age of — years],

with intent [&c., conclude as in No. 1, *supra*].

9 & 10 *Vic.*, c. 25, s. 27, (page 28).—3. *Attempting to set fire to Buildings*—feloniously, unlawfully, and maliciously did attempt, by then &c., [state the overt act], feloniously, maliciously, and unlawfully to set fire to a certain dwelling house, [or as the case may be], [then being the property of E. F., and situate in the Colony of —, with intent thereby then to injure the said E. F.], contrary, &c.

*Id.*, s. 3.—4. *To maim, &c., by explosive Substances*.—[Proceed as in No. 3, *supra*, then]: burn [or maim, disfigure, or disable, or do certain grievous bodily harm to] one C. D., then and there being, contrary, &c.

16 *Vic.*, No. 17, s. 3.—5. *Using, &c., Chloroform, &c., for the pr-*

[or with intent to assist him [or one E. F.] in committing a felony],  
contrary, &c.

### FORM OF CONVICTION.

Given under our hands and seals, at ———, in the Colony aforesaid, this  
— day of ———, 186—.      A. B., J. P. } Justices' names. (L. S.)  
                                     C. D., J. P. } (L. S.)

9 G. IV., c. 31, s. 22, (page 42)]—that A. B., on the — day of —.

(v) See *R. v. Read*, (8 L. J. M. C., 19).

in the year of our Lord 186—, did marry and take to wife one C. D., and then had her for his wife, and that the said A. B. afterwards, and while he was so married to the said C. D. as aforesaid, to wit, on the — day of —, in the year of our Lord 186—, feloniously and unlawfully did marry and take to wife one E. F., the said C. D., his former wife, being then alive, contrary, &c.

#### *Blasphemy.*

1 *Hawk.*, c. 3, ss. 1, 3, (page 43).—*Publishing Blasphemous Libels*—did unlawfully and wilfully compose, print, and publish, and cause and procure to be composed, printed, and published, a certain scandalous, impious, blasphemous, and profane libel of and concerning the Holy Scriptures and the Christian religion.

#### *Burglary.*

7 & 8 G. IV., c. 29, s. 11, (page 49).—1. *Entering a Dwelling-house by night, with intent to commit Felony*—about the hour of [eleven] in the night of the same day, did feloniously and burglariously break and enter the dwelling-house of one [or the said] C. D., situate in —, in the Colony of —,\* with intent then and there feloniously and burglariously to steal, take, and carry away the goods and chattels then being in the said dwelling-house, and then in the said dwelling-house feloniously and burglariously did steal, take, and carry away twenty silver spoons [or as the case may be], of the value of £ —, of the goods and chattels of the said C. D. then being found in the said dwelling-house, [or, if bank notes or other valuable securities be stolen, conclude]: contrary, &c. (See *R. v. Clarke*, 1 C. & K., 421; *R. v. Page*, 1 Cox, C. C., 218).

7 & 8 G. IV., c. 29, s. 11.—2. *Being therein and committing a Felony and breaking out in the Night-time*—being in the dwelling-house of one [or the said] C. D., situate in —, in the Colony of —, did feloniously steal, take, and carry away —, of the value of —, of the goods and chattels of the said C. D., [or of one E. F.], then being in the said dwelling-house, and that the said A. B., so being as aforesaid in the said dwelling-house, and having committed the said felony in manner and form aforesaid, afterwards, to wit, on the day and year aforesaid, at — aforesaid, about the hour of — in the night of the same day, did then feloniously and burglariously break out of the said dwelling-house, contrary, &c.

1 *Vic.*, c. 86, s. 2.—3. *The like, and using Violence to Persons therein*—[Proceed to the asterisk\* in Form No. 1, *supra*, stating the intent according to circumstances, then]: and did then in the said dwelling-house feloniously assault the said C. D., [or one E. F.], then being in the said dwelling-house, with intent then and there feloniously, wilfully, and of his malice aforethought, to kill and murder,

[or feloniously stab, or cut, wound, or hurt, or strike the said C. D. [or one E. F.], then being therein],  
contrary, &c.

#### *Carnally Knowing Female Children.*

9 G. IV., c. 31, s. 17, (page 55).—1. *Girls under Ten Years of Age*—feloniously did unlawfully and carnally know and abuse a certain girl

named C. D., she the said C. D. being then under the age of ten years, to wit, of the age of — years, contrary, &c.

*Id.*—2. *Above Ten and under Twelve Years of Age*—did unlawfully and carnally know and abuse a certain girl named C. D., she being then above the age of ten years, and under the age of twelve, to wit, of the age of [eleven] years, contrary, &c.

#### *Carriages—Licensed.*

6 W. IV., No. 2, s. 14, (page 58).—1. *Driver carrying on roof Luggage above the proper Height*—then and there being the driver of a certain stage-coach with four wheels, drawn by four horses, and travelling on the Queen's highway, and then and there employed as a public stage-carriage for the purpose of conveying passengers for hire to and from — and —, in the said Colony,\* did then and there carry and convey, and suffer and permit to be carried and conveyed, on the top and roof of the said stage-coach a quantity of luggage exceeding ten feet and three inches in height from the ground, measuring to the highest point of such luggage so being upon the top and roof of the said stage-coach, contrary, &c.

*Id.*, s. 17.—2. *Refusing permission to measure Luggage, &c.*—[*Proceed to the asterisk\* in Form No. 1, supra, and then*]: did refuse to permit and allow the said coach, and the luggage thereof, to be measured, or the number of passengers in the inside and on or about the outside of the said coach to be counted, he being thereunto duly required by one C. D., then and there being an inside passenger travelling in the said coach, and having paid for his place in the said coach, contrary, &c.

*Id.*, s. 18, (page 58).—3. *Driver quitting the box before a proper person stood at the horses' heads*.—[*Proceed to the asterisk\* in Form No. 1, supra, and then*]: did stop the said carriage at — [aforesaid], and did then and there quit the box of the said carriage without delivering the reins into the hands of some fit and proper person, and before any fit and proper person was placed or stood at the heads of the horses, or any of them, belonging to the said carriage, and had the command of the said carriage, contrary, &c.

*Id.*—4. *Driver or Guard using abusive language to a Passenger*.—[*Proceed to the asterisk\* in Form No. 1, supra, and then*]: did unlawfully use abusive and insulting language to C. D., of &c., who was then and there travelling as an [inside] passenger by the said carriage, contrary, &c.

*Id.*, s. 47.—5. *Neglecting to take care of Passengers' Luggage*.—[*Proceed to the asterisk\* in Form No. 1, supra, then thus*]: did unlawfully neglect to take due care of certain luggage, to wit, [a portmanteau], then and there being carried on the said coach, containing divers articles of wearing apparel belonging to C. D., of &c., who was then and there an [inside] passenger travelling by the said coach, by reason of which neglect the said portmanteau and its contents became wholly lost, contrary, &c.

*Id.*, s. 48.—6. *Furious Driving*.—[*Proceed to the asterisk\* in Form No. 1, supra, then*]: did unlawfully and wilfully, by wanton and furious driving, endanger the safety of C. D., who was then and there an [inside] passenger by the said coach, and divers, to wit, —, other persons, who

were also then and there passengers in and upon the same coach, contrary, &c.

#### *Cattle.*

7 & 8 G. IV., c. 29, s. 25, (page 61.)—1. *Stealing*—did feloniously steal, take, and drive [or lead or carry] away, one horse, [or mare, gelding, colt, filly, bull, cow, ox, heifer, calf, ram, ewe, sheep, or lamb], [of the price of — pounds], [of the goods and chattels of one [or the said] C. D.], contrary, &c.

*Id.*—2. *Killing with intent to Steal*—did wilfully and feloniously kill one horse [or as in 1] of the goods and chattels of one [or the said] C. D., with intent then feloniously to steal, take, and carry away the carcase [or skin, or a certain part of the carcase, that is to say, the inward fat] of the said — so killed as aforesaid, contrary, &c.

7 & 8 G. IV., c. 30, s. 16.—3. *Maliciously Killing, &c.*—did unlawfully, maliciously, and feloniously kill [or maim, or wound] a certain mare, [or as the case may be], the property of one [or the said] C. D., contrary, &c.

#### *Challenge.*

1 Hawk., c. 63, s. 3, (page 64.)—1. *Provoking to Fight or send a Challenge*—did wickedly, wilfully, and maliciously utter, pronounce, declare, and say [or speak, declare, say, and publish] to and in the presence and hearing of one [or the said] C. D., certain provoking, malicious, and scandalous words, with intent to instigate, excite, and provoke the said C. D. to fight a duel with and against him the said A. B., [or to send a challenge to him the said A. B. to fight a duel with and against him the said C. D.]

*Id.*—2. *Sending Challenge*—did wickedly, wilfully, and maliciously compose, write, send, and deliver [or cause to be delivered] to one [or the said] C. D., a certain letter and paper writing, containing a challenge to fight a duel with him the said A. B.

#### *Child Stealing.*

9 G. IV., c. 31, s. 21, (page 64.)—*Taking or decoying away a Child under Ten Years of Age*—did feloniously and maliciously by force [or fraud] lead [or take, or decoy, or entice away, or detain] one C. D., then a child under the age of ten years, to wit, of the age of [eight] years, with intent to deprive one S. D., the father of the said child, of the possession of the said child,

[or with intent, one woollen cloth waistcoat, of the value of — and —, thereupon and about the person of the said child, then feloniously to steal, take, and carry away],  
contrary, &c.

#### *Coin.*

9 Vic., No. 1, s. 6, (page 67.)—1. *Uttering Counterfeit Gold or Silver Coin*—did tender, utter, and put off to one C. D. one piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for a certain piece of the Queen's current gold [or silver] coin, called a sovereign [or shilling, or as the case may be], he the said A. B., at the time he so tendered and uttered the said piece of false and counterfeit coin, well knowing the same to be false and counterfeit,\* contrary, &c.



*Id.*, s. 7.—2. *The like*, [or as in Forms Nos. 3, 4, 5], a *Second Offence*.—[State the offence as in No. 1, *supra*, but that it was done "feloniously," and then adding at the end]: he the said A. B. having before then, to wit, on the — day of —, at —, been duly convicted for having before then unlawfully, &c., [stating offence shortly], contrary, &c.

*Id.*—3. *Uttering Counterfeit Gold or Silver Coin, and having others in Possession*.—[Proceed as in Form No. 1, *supra*, to the asterisk\*, then]: and that he the said A. B. also, at the time of such uttering and tendering, had then in his possession, besides the pieces [or piece] of false and counterfeit coin so tendered and uttered [or put off] as aforesaid, two [or one] other pieces [or piece] of false and counterfeit coin, resembling and apparently intended to resemble and pass for certain of the Queen's current gold [or silver] coin, called —, contrary, &c.

*Id.*—4. *Uttering twice within Ten Days*.—[Proceed as in Form No. 1, *supra*, to the asterisk\*, and then]: and that the said A. B. afterwards, and within ten days of his so tendering and uttering the said false and counterfeit coin aforesaid, to wit, on the — day of —, [or on the same day, in the year aforesaid], at —, in the said Colony, did tender and utter [or put off] to one E. F. one other piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for a certain piece of the Queen's current gold [or silver] coin, called —, he the said A. B., at the time he so tendered and uttered the said last-mentioned piece of false and counterfeit coin, well knowing the same to be false and counterfeit, contrary, &c.

*Id.*, s. 7.—5. *Having possession of Counterfeit Coin with intent to utter same*—had in his custody and possession [two] pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for certain of the Queen's current gold [or silver] coin, called —, with intent then to utter and put off the same, he the said A. B. then well knowing the same to be false and counterfeit, contrary, &c.

#### *Concealing Birth.*

9 G. IV., c. 31, s. 14, (page 68)]—that A. B., on the — day of —, in the year of our Lord 186—, was delivered of a child alive, which said child then, to wit, on the day and year aforesaid, died, and that the said A. B., being so delivered of the said child as aforesaid, did then unlawfully endeavour to conceal the birth of the said child, by secretly burying [or as the case may be] the dead body of the said child, contrary, &c.

#### *Conspiracies.*

*Com. Law*, (page 69).—1. *General*—that A. B., of &c., E. F., of &c., and G. H., of &c., did, on the — day of — last, unlawfully, fraudulently, and deceitfully conspire and agree together to obtain and acquire to themselves, by devices, false pretences, and subtle means and devices, of and from M. N. and P. Q., divers goods and chattels, the property of the said M. N. and P. Q. respectively, and to cheat and defraud them respectively thereof. (See *R. v. Parker*, 3 Q. B., 298).

*Id.*—2. *To accuse of Crime*—that, on &c., at &c., C. D. and E. F.

did amongst themselves unlawfully and maliciously conspire and combine falsely to charge and accuse one A. B., that he the said A. B. had then lately before feloniously stolen, taken, and carried away a horse, the property of one G. H.

*Id.*—3. *Conspiracy to obtain Goods by false Representations as to Property*—that A. B. and C. D., on the — day of —, &c., unlawfully and fraudulently did conspire and agree together to cause it to be believed that the said A. B., who was then a person in indigent and insolvent circumstances, carried on an extensive business at —, as —, and was a man of large property, and had a large capital engaged in the said business, and by means of the said belief to obtain and acquire of and from divers tradesmen and persons in business who should thereafter deal with the said A. B., divers goods, wares, and merchandize, the property of the said tradesmen and persons in business, and to cheat and defraud them thereof.

#### *Dead Bodies.*

(*Page 79*).—*Disinterring*—did unlawfully break and enter the churchyard [or graveyard] of —, and belonging to the [—] church of — there situate, and the grave there in which E. F., deceased, had lately before then been interred and then was, did unlawfully, wilfully, and indecently dig, open, and take and carry away the body of the said E. F.

#### *Disorderly House, Keeping.*

(*Page 79*)—that A. B., and C. his wife, on &c., and on divers other days and times subsequent thereto, unlawfully did keep and maintain a certain common, ill-governed, and disorderly house, at —, in the Colony of New South Wales, and for the lucre and gain of him the said A. B. did then unlawfully and wilfully cause and procure divers persons, as well men as women, of evil name and fame, and of dishonest conversation, unlawfully to frequent and come together there, as well by night as by day, and did then and there permit them to be and remain drinking, tippling, whoring, and misbehaving themselves, to the great damage and common nuisance of all persons there inhabiting, living, residing, and passing.

#### *Dogs.*

8 & 9 Vic., c. 47, s. 2, (*page 86*).—1. *Stealing a Dog*—did unlawfully steal, take, and carry away a certain dog, to wit, [a spaniel], of the value of two pounds, the property of one C. D. [or the said C. D.], contrary, &c.

*Id.*, s. 5.—2. *Complaint to ground Search Warrant for a Stolen Dog*.—[*Proceed in the usual Form*, Chap. II., No. 1, *ante*, p. 450, and then]: that he the said C. D. [*the complainant*] hath lately lost a certain dog, to wit, [a spaniel of a black and tan colour], and that he has just cause to suspect and doth suspect and believe that A. B., of —, of the Colony aforesaid, [*laborer*], hath stolen the same, and that the same dog is now in the possession [or concealed on the premises] [or as the case may be], of the said A. B., situate at — aforesaid.

3. *Search Warrant thereon*.—[*Proceed in the general Form*, Chap. II., No. 10, *ante*, p. 453, by reciting the Complaint No. 2, *supra*, and then thus]: These are therefore to command you in Her Majesty's name to

make diligent search for the said dog in the said premises of the said A. B., and, if you shall find it therein, then that you bring the same and also the body of the said A. B. before me or some other of Her Majesty's Justices of the Peace in and for the said [Colony], to answer to the said complaint, and to be further dealt with according to law.

*Id.*, s. 3.—4. *Having a Stolen Dog in possession, found by virtue of a Search Warrant*—a certain dog, to wit, a spaniel, the property of one C. D., [or the said C. D. the complainant], [by a certain ill-disposed person unknown, then lately before unlawfully stolen, taken, and carried away], was found in the possession [or in the dwelling-house] of the said A. B. there situate, by virtue of a search warrant theretofore in that behalf duly granted, he the said A. B. then and there well knowing the said dog to have been unlawfully stolen, taken, and carried away, contrary, &c.

5. *General Forms to be used in enforcing the Convictions*.—Chap. II., No. 32, *ante*, p. 460, where imprisonment only adjudged; or No. 31, *ante*, p. 460, where a penalty imposed; Commitment, &c., No. 58, *ante*, p. 475; and for Costs, Distress Warrant, &c., Nos. 61 and 63, *ante*, pp. 477 & 479, in the former, or Commitment No. 53, *ante*, p. 472, in the latter case.

6. *Variation in Conviction*.—Chap. II., No. 31, *ante*, p. 460. *In the adjudication say*: to forfeit and pay the sum of — over and above the value of the said dog, and for the said dog the further sum of —, to be respectively paid and applied, &c.

#### *Drunkenness.*

19 *Vic.*, No. 24, *Schedule B*, (page 89).—To J. W., —, Chief Inspector of the Sydney Police Force, and to all other Constables in the said Police Force, and the Keeper of Her Majesty's Gaol at Darlinghurst, Sydney, [or to the Watch-house Keeper, as the case may be].

Whereas, on the — day of —, in the year of our Lord 186 —, the undersigned persons were convicted before me, the undersigned Justice of the Peace, for the offence of drunkenness: These are to authorize you the said Chief Inspector, and all other constables, to convey the said persons to the Gaol [or Watch-house] at —, and you the said Keeper are hereby ordered to keep and detain the said persons in your custody and in solitary confinement in the — aforesaid, for the time or period set opposite to their respective names, unless the fine be paid in the meantime.

| Name of Prisoner. | Crime.                            | Sentence. |                        |
|-------------------|-----------------------------------|-----------|------------------------|
|                   |                                   | Fine.     | Period of Confinement. |
| John Jones.       | Drunk and disorderly in — street. | 40s.      | or, 48 hours cells.    |

Given under my hand, the day and year above written, at —, in the said Colony.  
H. F., J. P.

#### *Embezzlement, Clerk or Servant*

(Page 94).—being then clerk [or servant] to C. D., did by virtue of his said employment, while he was so employed as aforesaid, receive and

take into his possession certain money, to wit, the sum of — [or as the case may be], for the said C. D., his master, and then fraudulently and feloniously did embezzle the same; and so the said A. B. then in manner and form aforesaid did feloniously steal, take, and carry away the said money [or as the case may be], the property of the said C. D., his master, from the said C. D., his master, contrary, &c.

*Entry (Forcible) and Detainer.*

(Page 98).—1. *Taking Possession*—did forcibly and with strong hand enter into a certain messuage, with the appurtenances there situate, of which one [or the said] C. D. was then seised in his demesne as of fee [or possessed for a certain unexpired term of years], and the said C. D. from the peaceable possession of the said messuage, with the appurtenances aforesaid, forcibly and with strong hand unlawfully did expel and put out, contrary, &c.

2. *Keeping Possession*—did unlawfully enter a certain messuage, with the appurtenances there situate, of which one [or the said] C. D. was seised in his demesne as of fee, [or possessed for a certain term of years, whereof divers, to wit, — years were then to come and unexpired], and the said C. D. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there did unlawfully expel and put out, and that the said A. B. then and there hitherto the said C. D. from the possession of the said messuage, with the appurtenances aforesaid, with force and arms and with strong hand unlawfully and injuriously did keep out, and the said messuage and appurtenances, and the possession thereof then and there unlawfully and forcibly did hold and detain, and still doth hold and detain from the said C. D., contrary, &c.

*Extortion.*

*Com. Law, (page 111).—By a Constable*—being then a constable of —, in the said Colony, unlawfully, corruptly, and by pretext and colour of his said office, by extortion did extort and receive of and from one [or the said] C. D., then in the custody of the said A. B., the sum of —. as and for a fee due to him the said A. B. as such constable, whereas in truth and in fact no fee whatever [or no greater fee than the sum of —] was due to the said A. B. as such constable aforesaid.

*False Imprisonment.*

*Com. Law, (page 111).—Assault and False Imprisonment*—on &c. unlawfully assaulted one C. D., and then unlawfully imprisoned and detained in prison the said C. D. for a long space of time, against his will and without any legal authority or justifiable cause whatsoever.

*False Pretences.*

7 & 8 G. IV., s. 29, s. 53, (page 111).—1. *Obtaining Money by*—lawfully, knowingly, and designedly did falsely pretend to C. D. that the sum of five pounds was then due and owing by and from the said C. D. to the said A. B., for goods before then sold and delivered by the said A. B. to the said C. D., by means of which said false pretence the said A. B. did then unlawfully obtain from the said C. D. certain money, to wit

the sum of five pounds, the moneys of the said C. D., with intent to defraud, whereas in truth and in fact the sum of five pounds was not, nor was any part thereof, due or owing by or from the said C. D. to the said A. B. for goods before then sold and delivered, or for, upon, or by reason of any contract or account whatsoever; and whereas in truth and in fact there was not any money whatever then due or owing to the said A. B. by the said C. D., as he the said A. B. then well knew, contrary, &c.

*Id.*—2]—on &c., did unlawfully, knowingly, and designedly falsely pretend to C. D. that [*state the false pretence*]; by means of which false pretence he the said A. B. did then unlawfully obtain [*state what he obtained*], with intent to defraud, whereas in truth and in fact [*traverse the false pretence*], as he the said A. B. then well knew, contrary, &c.

*Id.*—3. *Obtaining Goods, &c., by*—did unlawfully and knowingly, by a certain false pretence [*or by certain false pretences*], obtain of and from one [*or the said*] C. D. the sum of — in money, [*or a certain order for the payment and of the value of —, or as the case may be*], of the moneys [*or goods and chattels, or property*] of the said C. D., [*or of one E. F.*], with intent to cheat and defraud him of the same, against the Statute, &c. (See *Hamilton v. R.*, 9 Q. B., 271).

*Com. Law.*—4. *Attempting to obtain Goods, &c., by*—did unlawfully and knowingly, by false pretence, attempt and endeavour to obtain from one C. D. the sum of [*or as the case may be*] of the moneys [*or the goods, &c.*] of the said C. D., with intent to cheat and defraud him of the same.

#### *Forgery.*

11 G. IV., & 1 W. IV., c. 66, s. 3, (page 125).—1. *Forging a Bill of Exchange or Promissory Note*—did feloniously forge a certain bill of exchange [*or promissory note*], [*or a certain indorsement on, or assignment of, a certain bill of exchange or promissory note*],

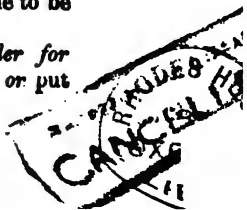
[*or a certain acceptance of a certain bill of exchange*], for the payment of —, with intent thereby then to defraud [*E. F.*], contrary, &c.

*Id.*—2. *Uttering a Forged Bill, &c.*—did feloniously offer, utter, dispose of, and put off a certain forged bill of exchange, &c., [*as in No. 1*], with intent thereby then to defraud [*E. F.*], as the said A. B. then well knowing the same to be forged, contrary, &c.

*Id.*—3. *Forging and uttering a Bank Note*—did feloniously forge [*the indorsement, or assignment of and upon*] a certain bank note [*or bank bill of exchange, or bank post bill*] for the payment of — pounds, [*or divers bank notes*], and the said forged bank note then feloniously and knowingly did offer, utter, dispose of, and put off, with intent thereby then to defraud [*the Company or Managing Director or President of the bank of —, or as the case may be, (see respective Acts of Incorporation)*], contrary, &c.

*Id.*—4. *Uttering a Forged Bank Note*—did feloniously utter, offer, dispose of, and put off a certain bank note for the payment of —, with intent to defraud [*C. D.*], as the said A. B. well knowing the same to be forged, contrary, &c.

*Id.*—5. *Forging, &c., a Banker's Draft, Undertaking, or Order for Money*—did feloniously forge and alter, [*or utter, offer, dispose of, or put*



off], well knowing the same to be forged and altered, a certain order for the payment of £—, with intent thereby then to defraud [E. F.], contrary, &c.

#### Gaming.

14 Vic., No. 9, (page 126).—*General Forms to be used in enforcing the Convictions*—Chap. II., No. 32, ante, p. 460, or No. 30, ante, p. 459; *Commitment*, No. 58, ante, p. 475; or *Distress Warrant, &c.*, Nos. 44, 45, 46, 50, ante, pp. 467, 468, & 470.

*Id.*, s. 7, (page 128).—1. *Cheating at Play*—did unlawfully obtain from one [or the said] C. D. certain money, to wit, the sum of — pounds, by means of a certain fraud and unlawful device and ill-practice in playing a certain game called — with cards, [or dice], with the said C. D., and winning thereby from the said C. D. to him, the said A. B., the said sum of —, with intent thereby then to cheat and defraud the said C. D. of the same, contrary, &c.

[Or this Form may be as for obtaining money by false pretences, No. 3, ante, p. 501].

*Com Law*.—2. *Keeping a Common Gaming House*—did unlawfully keep and maintain a certain common gaming house, and in the said gaming house, for lucre and gain, unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come to play together at a certain unlawful game of —, called —, and there did permit and suffer the said idle and evil-disposed persons to be and remain playing and gaming at the said unlawful game, for divers large and excessive sums of money.

#### Housebreaking.

7 & 8 G. IV., c. 29, ss. 12, 13, (page 144).—1. *Breaking and entering a Dwelling-house, or Building within the Curtilage, with a Communication between them, and stealing therein*—did feloniously break and enter the dwelling-house of one [or the said] C. D., there situate,

[or a certain building, to wit, a —, within the curtilage of the dwelling-house of one [or the said] C. D., there situate, occupied therewith, and having an immediate communication between them, or by means of a covered or inclosed passage leading from the one to the other], and then and there in the said dwelling-house did feloniously steal, take, and carry away [describe the articles, &c.], to the value, in the whole, of five pounds and more, of the goods and chattels of the said C. D., contrary, &c.

*Id.*, s. 14.—2. *The like, a Building within the Curtilage, but no Communication between them*—did feloniously break and enter a certain building of one [or the said] C. D. there situate, [the said building being then and there within the curtilage of the dwelling-house of the said C. D. there situate, and by the said C. D. then and there occupied therewith, and there not being then any communication between the said building and the said dwelling-house, either immediate or by means of any covered or inclosed passage leading from one to the other], and that the said A. B. then and there, in the said building, [six silver tea-spoons, —], of the goods and chattels of the said C. D. in the said building then being found, feloniously did steal, take, and carry away, contrary, &c.

16. *Vic., No. 17, s. 1, (page 145).*—3. *Being armed, &c., with Intent to break into a Dwelling-house, &c.*—was found by night, to wit, at the hour of — in the night of the same day\*, armed with a certain dangerous and offensive weapon and instrument, to wit, a —, with intent then to break and enter the dwelling-house [or a certain building, to wit, a —] of [the said] C. D., there situate, and to commit a felony therein, [or, from the asterisk\*, having then in his possession, without lawful excuse, ten picklock keys, [crow, jack, bit], and divers implements of housebreaking, to wit, [two crows, one jack, and one bit], [or, from the asterisk\*, having his face blackened [or disguised], with intent to commit a felony], [or, from the asterisk\*, in the dwelling-house [or in a certain building, to wit —] of [the said C. D. there situate, with intent to commit a felony therein],

contrary, &c.

#### *Indecency.*

*Com. Law, (page 153).*—*Exposing Person naked to public View*—unlawfully, on a certain public and common highway there situate, did wilfully, wickedly, and scandalously expose to the view of one C. D. and E. F., and divers of the liege subjects of our Lady the Queen, then and there passing and repassing, the body and person of him the said A. B. naked and uncovered, for a long space of time, to wit, for the space of one hour, to the great scandal of said liege subjects of our said Lady the Queen.

#### *Juvenile Offenders.*

14 *Vic., No 2, s 1, (page 272).*—1. *Persons not exceeding Sixteen Years of Age, committing, &c., certain Indictable Offences*—then and there, being under the age of sixteen years, to wit, of the age of twelve years, did then and there feloniously steal, take, and carry away\*,

[or did then and there unlawfully attempt and endeavour then and there feloniously to steal, take, and carry away\*] [*here describe the particular offence as*]: one coat, of the value of —; one hat, of the value of —; and three pieces of the current gold coin of this realm called sovereigns, of the value of three pounds, of the goods, chattels, and moneys of one [or the said] C. D., contrary, &c.

*Id., s. 5, (page 274).*—2. *Recognizance for Appearance at Petty Sessions*].—[*This will be the same as the general Form, Chap. II., No. 12, ante, p. 454, adding after the words "as may then be there" in the condition, these words*]: "in Petty Sessions assembled, at the usual place and in open court."

(*Page 274*).—3. *Enlargement of Recognizance*.—

To wit. } Be it remembered, that on this — day of —, in the year  
of our Lord 186 —, at —, in the Colony of —, the within  
recognizance is enlarged by me, J. S., Esquire, one of Her  
Majesty's Justices of the Peace in and for the said [Colony], until the  
Petty Sessions to be holden at —, in the said [Colony], before two or  
more of her said Majesty's Justices of the Peace in and for the said [Colony],  
on the — day of — next, at — o'clock in the forenoon.

Even under my hand and seal, the day and year first above mentioned,  
at — aforesaid.

J. S. (L. S.)

4. *Recognizance of a Witness to give Evidence*.—[*The Form*, Chap. II., No. 12, *ante*, p. 454, may be adapted to all persons, stating the condition *thus*]: the condition of the within written recognizance is such, that whereas A. B., of &c., hath been charged before me, the within-mentioned Justice [or as the case may be], for that &c. [state offences as in the information]; and the — day of — next, at —, having been duly appointed for the hearing of the said charge, and it appearing to be necessary that the within bounden E. F. should be examined as a witness touching the same: If, therefore, he the said E. F. will personally appear before two or more of Her Majesty's Justices of the Peace in and for the said [Colony] in Petty Sessions assembled, at the usual place and in open court, at —, aforesaid, on the — day of — aforesaid, at — o'clock at noon of the same day, and then and there give evidence upon the hearing of the said charge, then the said recognizance to be void, or else to stand in full force and virtue.

5. *Conviction (w) where Imprisonment with or without Whipping is adjudged*.—[This will be in the general *Form*, Chap. II., No. 32, *ante*, p. 460, omitting all mention of the costs of conviction, and stating after description of the Justices, that the conviction took place] "in Petty Sessions assembled, at the usual place and in open Court;" and where whipping also, say after the term of imprisonment: "and to be [once] privately whipped during such imprisonment."

6. *Conviction (Note w) where a Penalty adjudged, and where Time given or not for Payment*.—[This will be in the general *Form*, Chap. II., No. 32, *ante*, p. 460, omitting all mention of costs of conviction, and stating after description of the Justices, that the conviction took place] "in Petty Sessions assembled, at the usual place and in open Court."

7. *Commitment where Penalty adjudged*.—[This will be in the general *Form*, Chap. II., No. 53, *ante*, p. 472, reciting the conviction No. 6, *supra*, as therein directed. If time be given, and the defendant is detained under s. 13 till the time appointed for payment [as in "Order to detain," *Form* No. 9, *post*], the commitment in default should state, after the term of imprisonment, in the direction to the Gaoler]: "from the day when the said A. B. was so convicted as aforesaid."

8. *Commitment where Imprisonment only adjudged*.—[This will be in the general *Form*, Chap. II., No. 58, *ante*, p. 475, reciting the conviction No. 5, *supra*, and adapting the direction to the Gaoler to the terms of the adjudication].

(Page 273).—9. *Order to detain a Defendant in Custody till the Day given for Payment of a Penalty*. (Sec. 13).

To M. N., Constable of —, in the [Colony] of —.

Whereas [recite the conviction No. 6, *ante*, as in a commitment, with the adjudication and time of payment, and then]: And whereas the said A. B. hath not given security to the satisfaction of us the said Justices for his appearance on the said — day of —, being the day appointed for the payment of the said penalty as aforesaid, at — aforesaid, before

(w) The conviction, by s. 11 of the Statute, is to be transmitted "forthwith" after conviction to the Clerk of the Peace; but see the later enactment of 11 & 12 Vic., c. 43, s. 14, *ante*, p. 201.



two or more of Her Majesty's Justices of the Peace in and for the said [Colony] in Petty Sessions assembled, at the usual place and in open Court: These are therefore in her said Majesty's name to command you the said constable to detain the said A. B. in safe custody until the — day of — next, and him then to take before two or more of Her Majesty's Justices of the Peace in and for the said [Colony] in Petty Sessions assembled, at the usual place and in open Court, at — aforesaid, on the said — day of —, at twelve o'clock at noon, then and there to be further dealt with according to law.

Given under our hands and seals, this — day of —, 186 —, at —, in the Colony aforesaid.

J. P. (L. S.)

J. L. (L. S.)

10. *Recognizance of Offender to appear at the Day appointed for Payment of the Penalty*.—[*Proceed as in the general Form*, Chap. II., No. 12, ante, p. 454, stating the condition thus]: The condition of the within written recognizance is such, that whereas the said A. B. is this day duly convicted before us the Justices within mentioned, for that he the said A. B. [state offence and adjudication, and time appointed for payment, as in conviction No. 6, ante, and then]: if therefore he the said A. B. shall personally appear before two or more of Her Majesty's Justices of the Peace in and for the said [Colony] in Petty Sessions assembled, at the usual place and in open Court, at — aforesaid, on the — day of — next, [being the day appointed for payment of the said penalty as aforesaid], at twelve o'clock at noon, then the said recognizance to be void, or else to stand in full force and virtue.

11. *Recognizance for good Behaviour*.—This will be as the Form given in tit. "Sureties," post.

12. *Order for Restitution of Stolen Property*.—

Whereas on this — day of —, in the year of our Lord 186—, at —, in the [Colony] of —, one A. B. was duly To wit. } convicted before us, J. S. and J. L., Esquires, two of Her Majesty's Justices of the Peace in and for the said [Colony] in Petty Sessions assembled, at the usual place and in open Court, for that he the said A. B., on the — day of — then instant [or last], at —, in the said —, then and there being under the age of sixteen years, to wit, of the age of [twelve] years, did then and there feloniously steal, take, and carry away [here describe the article stolen, as in the conviction]: And whereas it is now duly proved to us the said Justices, that the said goods and chattels are now in the possession of E. F., of —, [laborer], we the said Justices do therefore hereby order the said E. F. forthwith to restore the said goods and chattels to the said C. D., the owner thereof.

Given under our hands and seals, the day and year and at the place first above-mentioned.

J. S. (L. S.)

J. L. (L. S.)

13. *Order on Defendant for the Payment of the Value of Stolen Property*.

To A. B., of —, in the [Colony] of —.

To wit. } Whereas, on the — day of —, in the year of our Lord 186—, at —, in the [Colony] of —, you the said A. B. were

duly convicted before us, J. S. and J. L., Esquires, two of Her Majesty's Justices of the Peace in and for the said —, in Petty Sessions assembled, at the usual place and in open Court, for that you the said A. B., on the — day of — then instant [or last], at —, in the said —, then and there being under the age of sixteen years, to wit, of the age of [twelve] years, did then and there feloniously steal, take, and carry away [here describe the article stolen, as in the conviction]: And we the said Justices did then and there order the said [article] to be restored to the said C. D., the owner thereof; and whereas the said [article] was not then forthcoming, and we, having now inquired into and ascertained the value of the said [article] in money, do ascertain the same to be — pounds; now we the said Justices do hereby order you the said A. B. to pay the said sum of — pounds to the said C. D., the true owner of the said [article], by [five] several instalments of — pounds each, and one of which said instalments we do order to be paid on the — day of each of the [five] calendar months next after the making of this our order, and which periods we the said Justices deem and adjudge to be reasonable in that behalf.

Given under our hands and seals, the day and year and at the place first above mentioned.

J. S. (L. S.)

J. L. (L. S.)

*Larceny.*

7 & 8 G. IV., c. 29, s. 39, (page 285, Of. 5).—1. *Stealing, &c., Trees, Shrubs, &c., of the value of 1s.*—did unlawfully steal, take, and carry away,

[or cut, break, root up, or destroy, or damage, with intent then to steal, take, and carry away],

a certain [or part of a certain] oak tree, [or sapling, shrub, or under-wood], to wit, [five branches thereof, if a part]\*, of the value of one shilling at the least, to wit, two shillings, the property of one [or the said] C. D., the prosecutor, then and there growing on certain land there situate, [in the occupation] of the said C. D.,

[or, if no stealing, say from the asterisk\*: and thereby then doing injury to the said C. D. to the amount of one shilling at the least, to wit, two shillings, and leave out, "of the value of one shilling at the least, to wit, two shillings"],

contrary, &c.

*Id.*, s. 40, (page 285, Of. 6).—2. *Stealing, &c., Fences, Stiles, Gates, &c.*—did unlawfully steal, take, and carry away

[or cut, or break, or root up, or throw down, with intent then to steal, take, and carry away]

[part of] a certain dead [or live] fence, [or a certain wooden post, pale, or a rail set up and used as a fence, or a certain stile, or gate], to wit, — piece of wood of the value of —, the property of one [or the said]

C. D., the complainant,

[or, if for injuring, say here: and thereby then doing injury to the said C. D., to the amount of —, and leave out "of the value of —"],

contrary, &c.

*Id.*, s. 41.—3. *Statement of the offence of having stolen Trees, &c., for the Conviction*—for that a certain [oak-tree] of the value of two shillings

at the least, to wit, three shillings, was found on the premises [or in the possession] of the said A. B., there situate, by virtue of a certain search warrant theretofore in that behalf duly granted, he the said A. B. well knowing the said [tree] to be on his premises aforesaid, and that he the said A. B., being now here brought before me the said Justice, doth not show unto or satisfy me the said Justice that he came lawfully by the said tree, but hath altogether failed in so doing, contrary, &c.

*Id.*, s. 42, (page 286, Of. 8).—4. *Stealing, &c., Plants, Fruits, &c., in Gardens, &c.*—did unlawfully steal, take, and carry away

[or destroy or damage, with intent then to steal, take, and carry away] certain fruit, [or plant, root, or vegetable production], to wit, one peck of apples, of the value of —, the property of one [or the said] C. D., then growing in a certain garden [or orchard, nursery-ground, hot-house, greenhouse, or conservatory] of the said C. D., there situate],

[or, if for an injury, say here: and thereby then doing injury to the said C. D., to the amount of —, and leave out, “of the value of —”],

contrary, &c.

*Id.*, s. 68.—5. *Discharge from a First Conviction*.—[The conviction will be in the regular Form to the end of the adjudication, and then thus]: but this being the first conviction of the said A. B., I do discharge him therefrom on payment forthwith of the following sums, ascertained by me for damages and costs, that is to say, — to C. D., the party aggrieved, for damages; and — to the said C. D. for his costs.

#### PRACTICAL OBSERVATIONS.

6. The *Convictions* will be in the general Forms, Chap. II., No. 32, *ante*, p. 460, where imprisonment adjudged; and Chap. II., No. 31, *ante*, p. 460, where penalty and sum for value or damage adjudged, and imprisonment in default of payment. The necessary variations in Conviction, No. 32, will be—

*Where for a second Offence*.—Insert the averment of the previous conviction, as given in the general Form, Chap. II., No. 37, *ante*, p. 462.

The necessary variations in Conviction No. 31 will be—

*Where for a second Offence*.—Insert the averment of the previous conviction, as given in the general Form, Chap. II., No. 37, *ante*, p. 462.

*Where Sum adjudged for Value or Damage, in addition to the Penalty*.

—Insert in the adjudication, “to forfeit and pay the sum of — over and above the amount of the injury so done to the said —, [or over and above the value of the said — so stolen] as aforesaid; and for the said injury [or — so stolen] the further sum of —, being the amount [or the value] thereof, to be respectively paid, &c.”

7. The general Forms for enforcing the convictions will be—

*Where Imprisonment adjudged*.—The Form of Commitment for the offence, Chap. II., No. 58, *ante*, p. 475, and the Distress Warrant, &c., for the costs, Chap. II., Nos. 61, 63, *ante*, pp. 477, 479, each adapted to the conviction above.

*Where Penalty, or Damage, or Value adjudged*.—The Form of Commitment No. 58, p. 472, adapted to the conviction above.

*Id.*, (page 287).—8. *Simple Larceny of the personal Goods of another*—did feloniously steal, take, and carry away certain money, to the amount of —, [or one silver watch], of the moneys [or goods and chattels] of one [or the said] C. D.

7 & 8 G. IV., c. 29, s. 23.—9. *Of Deeds, &c., relating to Real Property*—did unlawfully steal, take, and carry away a certain written parchment [or a certain map], the property of one [or the said] C. D., being then and there evidence of [part of] the title of the said C. D. to a certain real estate called —, in which the said C. D. then had and still hath a present interest, contrary, &c.

*Id.*—10. *Fraudulently destroying or concealing Will, &c.*—did unlawfully and for a fraudulent purpose destroy [or conceal] a certain will and testamentary instrument [or codicil or testamentary instrument] of one C. D., for the purpose of fraudulently depriving one E. F. of a certain real estate therein devised to him the said E. F., contrary, &c.

1 Vic., c. 87, s. 5, (page 288).—11. *Stealing from the Person*—did feloniously steal, take, and carry away from the person of [the said] C. D. [describe the articles or property], of the [moneys] goods and chattels [or property] of the said C. D., contrary, &c.

*Id.*—12. *Robbery from the Person, and by putting in Fear*—did feloniously make an assault in and upon the said C. D., and him the said C. D. did then feloniously put in bodily fear and danger of his life, and then did feloniously and violently steal, take, and carry away from the person and against the will of the said C. D. [describe the property taken], of the [moneys] goods and chattels [property] of the said C. D., contrary, &c.

*Id.*, s. 2.—13. *Robbery and Wounding*.—[Proceed to the asterisk\* in Form 12, *supra*, then]: and that the said A. B., immediately before [or at the time or after] he so robbed the said C. D. as aforesaid, did feloniously stab [or cut or wound] the said C. D., [or one E. F.] who then was there present], contrary, &c.

*Id.*, s. 3.—14. *Robbery, and being Armed*.—[Proceed to the asterisk\* in Form 12, *supra*, then]: the said A. B. being then armed with a certain offensive weapon and instrument, to wit, a bludgeon, contrary, &c.

7 & 8 G. IV., c. 29, s. 12.—15. *Stealing in a Dwelling-house, or a Building communicating therewith, to the value of £5 or more*—did feloniously steal, take, and carry away [one silver teapot and six silver teaspoons], of the value in the whole of £5, and more, of the goods and chattels of one [or the said] C. D., then being in the dwelling-house of the said C. D. there situate, contrary, &c.

1 Vic., c. 86, s. 5, (page 289).—16. *Stealing in a Dwelling-house, and putting any one therein in bodily Fear*—did feloniously steal, take, and carry away [six silver teaspoons] of the goods and chattels of one [or the said] C. D., then being in the dwelling-house of the said C. D. there situate; and at the time of the committing of the said felony, he the said A. B. did feloniously, by menaces and threats, put the said C. D. [or one M. D.], then being in the said dwelling-house, in bodily fear, contrary, &c.

16 Vic., No. 18, s. 16.—17. *Larceny, where three distinct Larcenies charged*.—[First count]—As No. 8, *supra*. [Second count]—the said A. B. afterwards, and within the space of six calendar months from the act of stealing alleged in the first count, feloniously did steal, take, and

carry away [one spade], the property of the said C. D. [*Third count*—that the said A. B. afterwards, and within the space of six calendar months from the act of stealing alleged in the first count, feloniously did steal, take, and carry away [one gold watch], of the property of the said C. D., contrary, &c.

7 & 8 G. IV., c. 29, s. 46.—18. *Larceny by a Clerk or Servant*—that A. B., being then servant to C. D., and while he was such servant, feloniously did steal, take, and carry away certain [money, to wit, the sum of —], belonging to the said C. D., his master, contrary, &c.

7 & 8 G. IV., c. 28, s. 11.—19. *After a previous Conviction*—[Describe this in the usual manner, stating at the conclusion, if known at the time of committal]: “before the committing of the said felony, to wit, on &c., the said A. B. was then and there convicted of felony, and which said conviction is still in full force.”

16 Vic., No. 18, ss. 14, 15.—20. *Larceny against Principals and Receivers*.—[After describing the offence of the principals, say]: and for that the said A. B., C. D., and E. F., afterwards, on the day and year aforesaid, feloniously did receive the said goods and chattels as aforesaid, feloniously stolen, taken, and carried away, they the said A. B., C. D., and E. F., at the time they so received the said goods and chattels, well knowing the same to have been feloniously stolen, taken, and carried away, contrary, &c.

#### *Letter (Threatening).*

4 G. IV., c. 54, s. 3, (page 289).—1. *To kill any Person, or burn House, &c.*—did knowingly, wilfully, and feloniously send [or deliver] to one [or the said] C. D. a certain letter with a certain fictitious name [or signature], to wit, the name [or signature] of one E. F., [or without any name or signature], thereto subscribed, directed to the said C. D., by the name and description of Mr. C. D., threatening to kill and murder him the said C. D., [or to burn and destroy the house [or as the case may be] of the said C. D.,

a subject of Her Majesty, then and there being, contrary, &c.

10 & 11 Vic., c. 66, s. 1.—2. *To kill or burn, &c.*—did knowingly and feloniously send [or deliver] to one [or the said] C. D. a certain letter [or writing] directed to the said C. D., by the name and description of Mr. C. D.,

[or directed to one E. F., by the name and description of Mr. E. F.], threatening to murder the said C. D., [or E. F., or one G. H.], [or to burn the house, or as the case may be] of the said C. D., [or E. F., or one G. H.], contrary, &c.

#### *Libels.*

*Com. Law, and 60 G. III., & 1 G. IV., c. 8, ss. 1, 4, (page 290).—*1. *Against the Queen*—did wickedly, maliciously, and seditiously write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel of and concerning our Sovereign Lady Queen Victoria and her Government.

6 & 7 Vic., c. 96, s. 8.—2. *Publishing or threatening to publish a Libel upon any person, &c., with a View to extort Money*—did unlawfully write, print, and publish, and cause and procure to be written and published,

[or threaten one C. D. to publish, or propose to one C. D. to abstain from printing and publishing, or offer to prevent the printing and publishing of]

a certain false libel of and concerning one C. D., [or a certain matter and thing touching [the said] C. D.], with intent then and thereby to extort from the said C. D. certain money [or as the case may be], contrary, &c.

*Id.*, s. 4.—3. *Publishing any defamatory Libel, knowing it to be false*]—did unlawfully write and publish, and cause and procure to be written and published, a certain false, scandalous, and defamatory libel of and concerning [the said] C. D., he the said A. B. then well knowing the said libel to be false, contrary, &c.

#### *Malicious Injuries.*

7 & 8 G. IV., c. 30, s. 20, (page 294).—1. *To Trees, Shrubs, to amount of 1s.*]—did unlawfully and maliciously cut, break, and damage [or bark, or root up, or destroy] certain trees, [or part of a certain oak-tree, or sapling, shrub, or underwood], to wit, three ash-trees, the property of one C. D., the complainant, then growing on certain land situate at —, in said Colony, [in the occupation] of the said C. D., and thereby then doing injury to the said C. D. to the amount of one shilling at the least, to wit, two shillings, contrary, &c.

*Id.*, s. 23, (page 295).—2. *Damaging Fences, Gates, &c.*]—did unlawfully and maliciously cut and break [or throw down, or destroy] [a certain part of] a certain fence [or gate, &c.] there, to wit, an iron-bark slab fence [or as the case may be], the property of one C. D. the complainant, thereby then doing injury to the said C. D. to the amount of —, contrary, &c.

#### PRACTICAL OBSERVATIONS.

The convictions for the above described offences will be in the general Forms, Chap. II., No. 32, p. 460, where imprisonment adjudged, and Chap. II., No. 31, p. 460, where penalty and sum for damage imposed. The necessary variations in conviction No. 32 will be as under "Larceny," p. 507.

The necessary variations in conviction No. 31 will be, *where for a second offence*, insert the averment of the previous conviction as shown in No. 37, Chap. II., p. 462.

*Where sum adjudged for Damage, in addition to penalty, insert in the adjudication*: to forfeit and pay the sum of — over and above the amount of the injury so done to the said — as aforesaid, and for the said injury so done the further sum of —, being the amount thereof, to be respectively paid, &c.

The general Forms for enforcing the convictions will be as stated under "Larceny," p. 507, No. 7.

7 & 8 G. IV., c. 30, s. 19, (page 297).—3. *To Trees, &c., growing in Orchard, Injury exc. £1*]—did unlawfully, maliciously, and feloniously cut and destroy a pear-tree of one C. D., then growing in a certain orchard of the said C. D., situate in —, in the Colony of —, thereby doing injury to the said C. D. to an amount exceeding the sum of one pound, to wit, to the amount of — pounds, contrary, &c.

9 & 10 Vic., c. 25, s. 6.—4. *Throwing Gunpowder or other explosive Substance into or near any Vessel, &c., with intent to destroy same*—did unlawfully, maliciously, and feloniously place [near] a certain vessel called the —, the property of one C. D., there being, [four ounces] of gunpowder, [or a certain explosive substance called —], with intent thereby to destroy the said vessel, contrary, &c.

#### *Manslaughter.*

*Com. Law, and 9 G. IV., c. 31, s. 9, (page 298)*—feloniously did kill and slay one C. D., [or a certain person whose name is unknown].

#### *Masters and Servants.*

20 Vic., No. 28, s. 2, (page 302).—1. *Servant not commencing Service under written Contract*—for that he the said A. B. did, on the twentieth day of January, in the year aforesaid, at —, in the [Colony] of New South Wales, contract with C. D., of —, in the said [Colony], to serve him in the capacity and employment of a servant in husbandry [or groom, house servant, or as the case may be] at —, in the [Colony] aforesaid, for the term of one year from the first day of February in the year aforesaid, and for the wages of —\*; the said contract being in writing, and signed by the said A. B. and said C. D., the contracting parties; and that the said A. B. did not at any time enter into or commence his said service, according to the said contract; but, on the contrary, wilfully and without lawful excuse omitted to enter upon such service, contrary to the Act of the Governor and Council of New South Wales passed in the ninth year of Her Majesty Queen Victoria, intituled “The Masters and Servants Act of 1857.”

*Id., s. 2, (page 302).*—2. *Having entered upon Contract, absenting or neglecting to fulfil the same.*—[Proceed to the asterisk\* in last Form, No. 1, and then] [or state the time for which hired, if conformable to the fact, thus]: from thence from week to week until his contract should determine by either party putting an end to the same on — in any week, [and if so, add: by either of them giving to the other of them one week's previous notice of his intention so to do]; and the said A. B., having entered into such service accordingly, did afterwards, to wit, on the — day of —, at —, in the said Colony, [where the said A. B. was then and there employed], before the term of his said contract was completed, unlawfully, and without leave of the said C. D., and without any lawful or just excuse, absent himself from his said service, and hath from thence neglected to fulfil his said contract, contrary, &c.

#### *Murder.*

*Com. Law, and 9 G. IV., c. 31, s. 3, (page 308)*—feloniously, wilfully, and of his malice aforethought, did kill and murder one C. D., [or a certain man whose name is unknown].

#### *Nuisances.*

*Com. Law, (page 317).*—1. *By Diverting a Watercourse*—that A. B., C. D., and E. F., on &c., and at divers other times, did unlawfully and injuriously divert and turn out of its ancient and accustomed channel and

course, and procure to be diverted, a certain ancient common watercourse and common stream of water, situate at —, in the [ *Colony* ] of —, and did then make and place, and cause and procure to be made and placed, a dam and embankment across the said stream, and did then and thereby deprive the inhabitants of the said place, and all other persons using the said stream of water and watercourse, of the said water, to the great damage and common nuisance of the said inhabitants and other persons.

2. *By carrying on a Trade offensive to the Smell*—that A. B., on &c., and on divers other days and times, unlawfully and injuriously did kill and cause to be killed divers large number of horses in —, in the [ *Colony* ] of —, and near to the dwelling-houses of divers persons then inhabiting the said houses, and also near to a certain public road and highway, and then and on the said other days and times unlawfully and injuriously did cause and permit the skins, flesh, bone, blood, entrails, excrements, and other filth of and from the said horses so killed as aforesaid, to lie and remain near to the said dwelling-houses, and near to the said public road and highway, for a long space of time, to wit, for the space of one week, whereby divers noisome and unwholesome smells did then arise from the said skin, flesh, bones, blood, entrails, excrements, and other filth, so that the air was then greatly corrupted and infected thereby, to the great damage and common nuisance of the inhabitants of the said houses, and of all other persons passing upon and along the said public road and highway.

8. *By keeping furious Dog near public road*—did then and there unlawfully keep and still doth keep a certain large dog of a fierce and furious nature, and doth permit and suffer the same to go unmuzzled and at large near the Queen's highway there.

#### *Pawnbrokers.*

13 Vic., No. 37, s. 26, (page 321).—1. *Neglecting to attend Justice's Summons with Books, &c.*—then exercising the business of a pawnbroker, was, upon a complaint before them duly made [upon oath] to one J. L., Esquire, one of Her Majesty's Justices of the Peace in and for the said —, respecting a certain information against the said A. B. for having offended against the Statute in force relating to pawnbrokers, to wit, — [ *here briefly describe the offence against the pawnbroker, or as the occasion may be* ], which, in the judgment of the said Justice, made the production of a certain book [ *or note* ], voucher, memorandum, duplicate [ *or paper* ], to wit, —, which then ought to have been in the custody and power of the said A. B., necessary, duly summoned to attend with the said book [ *or as the case may be* ] before the said Justice at a Petty Sessions of Her Majesty's Justices of the Peace in and for the said —, to be held at —, in the said —, on the — day of —, at — o'clock,

[ *or to attend with the said book, &c., on —, at — o'clock in the forenoon, at —, in the said —, before such Justices of the Peace for the said —, as might then be there,*

and that the said A. B., at the time and place last aforesaid, when and where he was so summoned to attend as aforesaid, did neglect [ *or refuse* ] to attend with the said book, [ *or as the case may be* ], according to the said summons,



[or did neglect [or refuse] to produce the said book [or as the case may be] in its true and perfect state, according to the said summons], and did not then and there show good cause for such neglect [or refusal] to the [my] satisfaction [of the said Justices], but on the contrary thereof made default therein, contrary, &c.

*Id.*, s. 17.—2. *Selling Goods pawned before 3 months*—then using and exercising the business of a pawnbroker, did, on the — day of —, in the year of our Lord 186—, at —, in the [Colony] of —, receive and take in from one E. F. [or the said C. D. the complainant], by way of pawn and pledge for the sum of —, certain goods, to wit, [a coat], the property of the said E. F. [or C. D.]; and that afterwards, and before the expiration of three months from the time when the said goods were so received and taken in pawn, to wit, on the — day of — last, at — aforesaid, the said A. B. did unlawfully cause the said goods to be sold, contrary, &c.

*Perjury.*

16 Vic., No. 18, s. 19, (page 325).—1. *Commitment for Perjury before Justices in Special or Petty Sessions.*—

To the Constable of —, in the said Colony, and to the Keeper of the [Gaol] at —, in the said Colony.

Whereas A. B., of &c., this day appeared before the undersigned, J. S., Esquire, and others [three] of Her Majesty's Justices of the Peace for the said Colony, now assembled and acting together in Special [or Petty] Sessions holden in and for —, in the said Colony, and being duly sworn, was examined and gave evidence *vidæ voce* before the said Justices on behalf of [the prosecution], in a certain proceeding at such Special [or Petty] Sessions, to wit, the hearing an application for an order for —, [or on the hearing of an information laid, or complaint, or charge made], by C. D. against E. F. [for the offence of —, or as the case may be]; and it appearing to the said Justices that the said A. B., in the evidence given by him, was then guilty of wilful and corrupt perjury, the said Justices therefore then, pursuant to section 19 of the Statute of the sixteenth year of Her Majesty, number eighteen, directed and ordered that the said A. B. should be prosecuted for the said perjury at the next Sessions of Oyer and Terminer and General Gaol Delivery for —, there having appeared to them a reasonable cause for such prosecution: And whereas the said A. B. has neglected to enter into a recognizance, with one or more sufficient surety or sureties conditioned for his appearance at such next Sessions of Oyer and Terminer and Gaol Delivery, then to surrender and take his trial for the said perjury: These are therefore, &c. [Proceed as in the general Form of Commitment for Trial, No. 52, page 449, to the asterisk\*, and then add]: until the next Sessions of Oyer and Terminer and Gaol Delivery for —, or until he shall be thence delivered by due course of law.

Given under my hand and seal, this — day of —, A. D. 186—, at the Special [or Petty] Sessions aforesaid. J. S. (L.S.)

*Publicans (Licensed).*

[A Form of Conviction is given by the Act].

13 Vic., No. 29, s. 37, (page 365).—1. *Permitting disorderly Conduct*

—for that he the said A. B., on the — day of —, at —, in the Colony of —, being then and there the keeper of a public eating-house and premises there situate, wherein refreshments were then being sold and consumed, did wilfully [or knowingly] permit drunkenness and other disorderly conduct (x) in his said house and premises there situate, contrary, &c.

*Id.*—2. *Permitting disorderly Conduct*—did wilfully permit disorderly conduct in his said house and premises, by then and there suffering persons, to the number of twelve and more, to remain fighting, drinking, and making a great noise and disturbance there, [or as the case may be], at a late hour of the night, to wit, at one o'clock, contrary, &c.

*Id.*—3. *Suffering unlawful Games*—did knowingly suffer a certain unlawful game, to wit, an unlawful game of *rouge et noir* [or hazard] to be played by one E. F. and G. H., and several other persons unknown, [or by several persons unknown], in his said house and premises, contrary, &c.

*Id.*—4. *Suffering any Gaming whatsoever*—did knowingly suffer gaming in his said house and premises, by then and there permitting one E. F. and G. H. [or several persons unknown] to play [for money, or ale, or spirituous liquors, if the case], at cards, [or as the case may be], contrary, &c.

*Id.*—5. *Permitting persons of notoriously bad character to meet together*, &c., thus:—did knowingly permit [or suffer] one E. F., one F. G., and other persons, the said E. F., F. G., and the said other persons there being persons of notoriously bad character, [or knowingly permit persons of notoriously bad character], to meet together in his said house and premises, and remain therein for a long space of time, to wit, the space of [as the case may be], contrary, &c.

*Id.*, s. 2, (page 362).—6. *Selling without a License*—did on &c., at &c., in the Colony of —, sell [or barter, exchange, or for valuable consideration dispose of] to one E. F., [or to some person unknown], [or did permit, or suffer, to be sold, or bartered, &c.], in the said house [or place] then and there situate, a certain quantity of spirituous liquors, to wit, one pint of gin, he the said A. B. not being then and there duly licensed so to do, and not being then and there the heir, executor, administrator, or assignee of any person duly licensed so to do, contrary, &c.

*Id.*, s. 52, (page 368).—7. *Justices' Order to close Public-houses in case of riot*.—[See "Riot," p. 515].

#### *Rape.*

9 *G. IV.*, c. 31, s. 16, (page 380)—did feloniously and violently assault one [or the said] C. D., and did then violently, and against her will, feloniously ravish and carnally know the said C. D., contrary, &c.

[See "*Carnally knowing Children*," ante, p. 494; "*Assaults*," Forms Nos. 14, 15, 16, ante, p. 491].

#### *Receivers.*

7 & 8 *G. IV.*, c. 29, s. 54, (page 381).—*Receiving, where the stealing amounts to a Felony*—did feloniously receive [or as the case may be]

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(x) It was decided in *Wray v. Tooke*, 12 Q. B., 492, that this mode of stating the offence is sufficient. See also this Case, as showing how a previous offence should be stated.

of the goods and chattels [moneys or property] of one [or the said] C. D., before then feloniously stolen, taken, and carried away, he the said A. B., at the time when he so received the said — as aforesaid, well knowing the same to have been feloniously stolen, taken, and carried away, contrary, &c.

*Reward.*

7 & 8 G. IV., c. 29, s. 58, (page 388).—*Corruptly taking Money on pretence of helping to Stolen Property*—did corruptly and feloniously take and receive from one [or the said] C. D. certain money and reward, to wit, the sum of — pounds, of the moneys of the said C. D., under pretence [or upon account] of helping the said C. D. to certain goods and chattels of him the said C. D., to wit, —, before then feloniously stolen, taken, and carried away, the said A. B. not having caused the said person by whom the said goods and chattels were so stolen, taken, and carried away as aforesaid, to be apprehended and brought to trial for the same, contrary, &c.

*Riot.*

13 Vic., No. 29, s. 52, (page 388).—1. *Justices' Order to close Public-houses in case of Riot*.—

To the Keepers of Inns, Alehouses, and Victualling-houses in —, in the Colony of —, and to each and every of them.

It appearing to us the undersigned, two of Her Majesty's Justices of the Peace in and for the [Colony] of —, that a riot or tumult has happened [or is reasonably expected to take place] in — aforesaid, we do hereby, in pursuance of the Statute in such case made and provided, order and direct that all and every person licensed under the Statute in that behalf to keep, and keeping inns, alehouses, or victualling-houses within the said district of —, shall close his house from the hour of — on this day, to the hour of — on — next, of which you and each of you are to take notice accordingly.

Given under our hands, this — day of —, A. D. 186 —.

[Justices' Signatures].

*Com. Law*.—2. *Tumultuously disturbing the Peace by three or more Persons*—that A. B., C. D., and E. F. did, together with divers other evil disposed persons to — unknown, on the — day of, &c., unlawfully, riotously, and routously assemble and gather together at —, with sticks, staves, and other offensive weapons, to disturb the peace of our Lady the Queen, and being so assembled and gathered together, and being then armed as aforesaid, did then and there unlawfully, riotously, and routously make a great noise, riot, and disturbance, and did then and there remain and continue armed as aforesaid, making such noise, riot, and disturbance, for the space of one hour and more, to the great disturbance and terror of divers persons being residing and passing there, [or, if there has been an assault from being so assembled, did then unlawfully, riotously, and routously assault, beat, ill-treat, and wound one G. H.].

*Id.*—3. *The like, shorter*—did, together with divers other evil disposed persons to — unknown, unlawfully and riotously assemble to disturb the public peace, and did then and there make a great riot and disturbance, to the terror and alarm of Her Majesty's subjects there being.

*Servants.*

16 Vic., No. 17, s. 7, (page 393).—1. *Assaulting Servants or Apprentices*—on &c., did unlawfully and maliciously assault one [or the said] C. D. his servant [or apprentice], and did then beat and ill-treat the said C. D., whereby the life of the said C. D. was then endangered, [or whereby the health of the said C. D. then was [or is] likely to be permanently injured], contrary, &c.

*Id.*—2. *Not providing Servants or Apprentices with necessary Food*—on &c., was the master of one [or the said] C. D. his servant [or apprentice], and was then legally liable to provide for the said C. D., as his servant [or apprentice] as aforesaid, necessary food and clothing, and the said — did then wilfully and without lawful excuse refuse and neglect to provide necessary food and clothing for him the said C. D., [query, whereby the life, &c., as in Form No. 1, *supra*, Arch. Cr. Pl., p. 552], contrary, &c.

*Soliciting to the Commission of an Offence.*

*Com. Law*, (page 394).—*Where the Offence solicited not Committed*—did falsely, wickedly, and unlawfully solicit and incite one E. F. to [here state the felony or misdemeanor solicited].

*Stage Coaches.*

See "*Carriages (Licensed)*."

*Suicide.*

*Com. Law*, (page 394).—*Attempting to Commit, by Poison*—did unlawfully take a certain quantity of a certain deadly poison [or destructive thing] called —, with intent then and thereby feloniously to kill and murder himself.

*Sureties.*

*Com. Law*, 5 *Burns's Justice*, 29th ed., p. 1202, (page 396).—1. *Complaint for direct Threats to do Bodily Injury*.—[*Proceed as in the general Form*, Chap. II., No. 1, *ante*, p. 450, to the asterisk,\* then]: did threaten the said C. D. in the words or to the effect following, that is to say, [set them out, with the circumstances under which they were used]; and that, from the above and other threats used by the said A. B. towards the said C. D., he the said C. D. is afraid that the said A. B. will do him some bodily injury, and therefore prays that the said A. B. may be required to find sufficient sureties to keep the peace and be of good behaviour towards him the said C. D.; and the said C. D. also saith that he doth not make this complaint against nor require such sureties from the said A. B. from any malice or ill-will, but merely for the preservation of his person from injury.

*Id.*—2. *Complaint for breaking the Peace by Fighting*.—[*Proceed as in the general Form*, Chap. II., No. 1, *ante*, p. 450, to the asterisk,\* and then]: did tumultuously, with force and arms, make an affray, and, being there, the said C. D. was assaulted and beaten by the said A. B. without any reasonable cause; and that, from the above and other circumstances, he the said C. D. verily believes that the said A. B. will be again guilty of a like

breach of the peace, and therefore he prays that the said A. B. may be required to find sufficient sureties to keep the peace and be of good behaviour.

*Id.*—3. *Complaint for Surety in case of Labels.*—[Form recognized in *Haylocke v. Sparke*, 22 L. J. M. C., 72.]—[*Proceed as in the general Form*, No. 1, *ante*, p. 450, *to the asterisk,\* then*]: That J. H., of &c., on &c., at &c., did write on the pavements, in a lane called —, in the said — of —, the following offensive words reflecting on the character of Mr. R. J. D., Station Master of the E. Railway Station, [that is to say], “Donkey D., the Railway Jackass,” and that the same offensive words have continually been written for many days before and since the said — day of —, on the pavements of the streets of the said — of —, and are calculated to produce and provoke a breach of the peace; and therefore the said R. J. D. prays that the said J. H. may be required to find sufficient sureties to keep the peace towards Her Majesty and all her liege subjects.

4. *Warrant to apprehend the Offender.*—This may be in the general Form, Chap. II., No. 10, *ante*, p. 453, reciting any one of the complaints No. 1–3, *supra*, applicable.

5. *Recognizance to keep the Peace, &c., for a limited Period, or to appear at the Quarter Sessions.*—This will be in the Form, Chap. I., No. 42, (S. 1), *ante*, p. 444, *with the following condition*: “The condition of the within-written recognizance is such, that if [the within bounden] A. B., [of &c.], shall appear at the next Court of General Quarter Sessions of the Peace to be holden at —, in the Colony of —, to do and receive what shall be then and there enjoined him by the Court, and in the meantime [shall keep the peace and be of good behaviour towards Her Majesty and all her liege people, and especially towards C. D., of &c., for the term of — now next ensuing, or from the — day of —], then the said recognizance to be void, or else to stand in full force and virtue.

6. *Notice of Recognizance.*—This will be similar to the Form No. 43, (S. 2), *ante*, p. 445, inserting the condition as in Form No. 5, *supra*.

*Com. Law, and 34 Edw. III.*—7. *Commitment in Default of Sureties for Peace or Good Behaviour.*—

To the Constable of —, in the Colony of —, and to the Keeper of the Gaol at —, in the said Colony.

Whereas, on the — day of — instant, complaint on oath }  
 To wit. } was made before the undersigned [or J. L., Esquire], one of Her Majesty's Justices of the Peace in and for the said —, by C. D., of —, in the said Colony, [laborer], that A. B., of &c., on the — day of —, at — aforesaid, did threaten, &c., [follow to end of any one of the complaints Nos. 1 to 3, *supra*, applicable in the past tense, then]: And whereas the said A. B. was this day brought and appeared before the said Justice [or J. L., Esquire, one of Her Majesty's Justices of the Peace in and for the said —], to answer unto the said complaint: And\* I have ordered and adjudged, and do hereby order and adjudge, that the said A. B. shall enter into his own recognizance in the sum of —, with [two] sufficient sureties in the sum of — [each], to keep the peace and be of good behaviour towards Her Majesty and all her liege people, and particularly towards the said C. D., for the space of — now next ensuing,

[*or, if required to find sureties till the Sessions, say from the asterisk\**: having been required by me to enter into his own recognizance in the sum of —, with [two] sufficient sureties in the sum of — each, as well for his appearance at the next General Quarter Sessions of the Peace to be held at —, in the [Colony] aforesaid, to do what shall be then and there enjoined him by the Court, as also in the meantime to keep the peace and be of good behaviour towards Her Majesty and all her liege people, and especially towards the said C. D.]:

And whereas the said A. B. hath neglected and refused to find such sureties as aforesaid: These are therefore to command you the said constable of — to take the said A. B., and him safely to convey to the [Gaol] at — aforesaid, and there to deliver him to the Keeper thereof, together with this precept: and I do hereby command you the said Keeper of the said [Gaol] to receive the said A. B. into your custody in the said [Gaol], there to imprison him\* for the space of —, unless such sureties shall be sooner found; and for your so doing this shall be your sufficient warrant, [*or, from the last asterisk\**, until the said next General Quarter Sessions of the Peace, unless such sureties shall be sooner found].

Given under my hand and seal, this — day of —, in the year of our Lord 186 —, at —, in the Colony aforesaid. J. S. (L. S.)

8. *Liberate of Defendant on finding Sureties, with Variation where Defendant has to enter into his own Recognizance at the Gaol.*

To the Keeper of the Gaol at —, in the said Colony of —.  
 } Discharge forthwith out of your custody the body of A. B.,  
 } now in your custody under a warrant of commitment, dated the  
 To wit. } — day of —, in default of sureties, he having [entered into his own recognizance and] found the sureties required by the said warrant, provided he [do first enter into his own recognizance in the sum and in the manner in the said warrant mentioned, and] be not detained in your custody for any other cause than what is mentioned in the said warrant.

Given under my hand and seal, this — day of —, 186—, at —, in the Colony aforesaid. J. S. (L. S.)

*Vagrant.*

15 Vic., No. 4, (page 414).—1. The 15th section of the Act enacts that “in every conviction for an offence contrary thereto, it shall be sufficient if the offence shall be stated in the words thereof, declaring any offence, or attaching any penalty thereto.” The Form, however, given by the same section seems to require something more than the statement of a conviction in the words of the Act. The Form is as follows:—

Be it remembered, that on the — day of —, A. D. 186—, at —, in the [Colony] of New South Wales, A. B. is convicted before me C. D., one of Her Majesty's Justices of the Peace in and for the said [Colony] of —, [here state offence in the words of this Act], within the intent and meaning of the Act of the Governor and Legislative Council passed in the fifteenth year of the reign of Her Majesty Queen Victoria, intituled, “*An Act for the more effectual prevention of Vagrancy, and for the Punishment of idle and disorderly Persons, Rogues, and Vagabonds,*

and incorrigible Rogues, in the Colony of New South Wales ;" that is to say, for that he, the said A. B., on the — day of —, at —, in the said Colony, [here state the offence proved before the Magistrate], and for which offence the said A. B. is ordered to be committed to Her Majesty's [Gaol] at —, [or House of Correction], there to be kept at hard labour for the space of —, [or until the next Quarter Sessions to be holden at —].

Given under my hand and seal, the day, year, and at the place first above written.

This is not very intelligible, for it either requires the offence to be stated twice over, or makes a distinction between the offence of which the party was convicted, and the offence proved before the Magistrate. Independently, therefore, of the general rule of law upon the subject, it will not be safe to state "the offence proved before the Magistrate" in so compendious a form as would satisfy the previous direction to state it "in the words of the Act." A few Forms, therefore, will be given, applicable to section 3, page 417.

Supposing a party to have been convicted of any of the offences mentioned in this section, or indeed of any offence under the Act, and the Form given by the Act to be pursued, it has been suggested by the late Chief Justice of Victoria that the first part be filled up, not by stating the offence "in the words of the Act," but by simply inserting instead the words, "*the offence hereinafter mentioned*,"—for it is not imperative that the exact form given should be followed,—and not stating the offence until the subsequent part.

15 Vic., No. 43, s. 3, (page 417).—2. *Having picklocks, &c., with intent*.—After the words, "*in the said Colony*": unlawfully had in his possession [or custody], to wit, in his —, [and, if so, add, at the time of his being then and there apprehended by one C. D.], a certain picklock, [or key, crow, jack, bit, or instrument, to wit, a knife], with intent then and there feloniously to break into a certain dwelling-house, [or warehouse, coach-house, stable, or out-building, to wit, a —], then being in the occupation of one E. F., contrary, &c.

*Id.*, (page 418).—3. *Party armed with gun, &c., with intent, &c.*—was unlawfully armed with a certain offensive weapon, to wit, a gun, [or pistol, hanger, cutlass, bludgeon], with intent then and there feloniously to steal, take, and carry away the goods and chattels of one E. F., then and there being, contrary, &c.

*Id.*, (page 418).—4. *Being on premises for an unlawful purpose*—was found in and upon a certain enclosed yard, [or garden, or dwelling-house, warehouse, coach-house, stable, or out-house, to wit, a —], then in the occupation of one C. D., for a certain unlawful purpose, to wit, — [describe it, as — to steal, take, and carry away apples or potatoes then and there growing, or feloniously to steal, take, and carry away certain fowls, to wit, two fowls, or a certain coat, or harness, saddle, or as the case may be], the property of the said C. D., then and there being, contrary, &c.

*Id.*, (page 418).—5. *Reputed Thieves frequenting public places with intent, &c.*—there being a suspected person or reputed thief, did then and there frequent a certain river [or canal, or navigable stream, dock,

basin, or quay, or a certain wharf, or warehouse near or adjoining to a certain river, &c. ; or a certain street or highway, or avenue leading to a certain street or highway, or a certain place of public resort called —] there situate, with intent the goods and chattels of a certain person unknown [or of one C. D., then and there being] then and there feloniously to steal, take, and carry away, contrary, &c.

*Id.*, (page 418).—6. *Resisting apprehension*—did violently resist one C. D., a constable of the said —, who was then and there apprehending him, by virtue of the Act of Council in that behalf, as an idle and disorderly person, for that he the said A. B. theretofore, to wit, on the — day of — last, at &c., [here state the particular offence in respect of which the defendant was convicted of being an idle and disorderly person], and of which said offence the said A. B. was subsequently, to wit, on the — day of — instant, convicted before J. S., Esquire, one of Her Majesty's Justices of the Peace in and for &c., contrary, &c.

#### *Weights and Measures.*

16 Vic., No. 34, (page 421).—1. *Stamping Weight without verifying same*—then being an Inspector of Weights and Measures for the district of —, in the Colony of —\*, did then and there unlawfully stamp a certain weight, [or measure], to wit, a [four-pound] weight, [or as the case may be], of one C. D., without then and there duly verifying the same by comparison with a copy of the imperial standard, contrary, &c.

*Id.*, (page 420).—2. *Guilty of Misconducting himself*.—[Proceed to the asterisk\* in Form No. 1, *supra*, then]: did then and there misconduct himself in the execution of his said office of Inspector, by then and there refusing to stamp a certain weight, to wit, a [four-pound] weight, of one [or the said] C. D., then and there produced to the said A. B. for that purpose, [or as the case may be], contrary, &c.

*Id.*, (page 421).—3. *Guilty of Breach of Duty*.—[Proceed to the asterisk\* in Form No. 1, *supra*, then]: was then and there guilty of a breach of his duty as such Inspector, in this, to wit, [here describe it], contrary, &c.

*Id.*, s. 8, (page 421).—4. *Refusing to compare Drinking Cups, &c.*—that on the — day of —, at —, in the said [Colony] of —, one C. D. did unlawfully buy of A. B., of &c., a certain quantity of ale, to wit, one quart of ale, by a certain vessel, to wit, a jug [or glass, drinking cup, wooden or wicker measure] then and there used by the said A. B., and represented by him as containing the quantity of a quart of imperial measure\*, and that the said A. B. did then and there refuse to ascertain, and did not then and there ascertain, the contents of the said vessel by comparing the same with a stamped measure by law required to be provided by the said A. B., although the said A. B. was then and there required so to do by the said C. D., contrary, &c.

*Id.*, (page 421).—5. *Drinking Cup found deficient*—that on the — day of —, at —, in the said [Colony] of —, one C. D. did unlawfully purchase of A. B., of &c., [proceed to the asterisk\* in last Form, then]: and that the said C. D. did then and there require the contents of the said vessel to be ascertained by a comparison with a stamped measure by law required to be provided by the said A. B., and that, on such com-



parison being then and there made, the said vessel was then and there found to be and was then and there deficient in quantity, contrary, &c.

*Id.*, s. 18, (page 422).—6. *Neglecting, &c., to produce Weights, &c.*—at his shop [or store, &c., called the —] there situate, wherein goods were then and there kept and exposed for sale, [or weighed for conveyance or carriage], did, on being then and there requested so to do by [the said] C. D., then being an inspector of weights and measures for the said — of —, neglect [or refuse] to produce for examination by the said C. D., according to the Act of Council in that behalf, the weights [or measures, &c.] of him the said A. B. then in his possession, he the said C. D. being then and there duly authorized\* in writing under the hand of J. L., Esquire, one of Her Majesty's Justices of the Peace in and for the said —, to enter the said shop, and examine, compare, and try the weights there found, contrary, &c.

*Id.*, (page 422).—7. *Obstructing Examination*—did obstruct [or hinder] one C. D., being then and there an inspector of weights and measures for the said [district] of —, in examining the weights [or measures, &c.] of him the said A. B., [or of one E. F.], at a shop [or as the case may be] of him the said A. B. [or E. F.], where goods were then and there kept and exposed for sale, he the said C. D. being then and there duly authorized, &c., [conclude from the asterisk\* in last Form].

*Witness.*

(Page 422).—See Chap. I., Nos. 19—34, *ante*, p. 434; and Chap. II., Nos. 16—22, *ante*, p. 455.

*Women.*

16 *Vic.*, No. 17, s. 1, (page 428).—*Procuring Defilement of a Woman under Twenty-one Years of Age*—did, by certain false and fraudulent pretences and representations, [or certain fraudulent means], unlawfully procure one C. D., then being a woman [or child] under the age of twenty-one years, to wit, of the age of [seventeen] years, to have illicit carnal connexion with a certain man named E. F., contrary, &c.

# THE AUSTRALIAN MAGISTRATE.

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## PART III.

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### CASES CONNECTED WITH THE DUTIES OF MAGISTRATES.

*Animals, Cruelty to.*—14 Vic., No. 40.—*Ex Parte Brown, July 20, 1854.*

Sir A. STEPHEN, C. J., delivered judgment in this case, which had been heard before himself in Chambers.

This defendant was convicted on the 29th June, under sec. 1 of the Cruelty to Animals Act, (*Call.*, 2226), of having cruelly beaten his horses, and sentenced to imprisonment with hard labour in the Sydney gaol for three calendar months. The evidence in the case appears on the face of all the depositions to have been taken before two Justices; but the memorandum or minute of the conviction, (made in pursuance of sec. 14 of Jervis's Summary Convictions' Act), has the signature of one Justice only. The warrant of commitment, moreover, although purporting in the body thereof to be by two Justices, and having two seals attached, is, in fact, signed by one only.

The Cruelty to Animals Act does not authorize any sentence to imprisonment, unless the conviction is by two Justices; and it was objected that here the conviction must be taken conclusively to have been by one only. Secondly,—That the *commitment* must be by two Justices, as the words of sec. 10 are, (*Call.*, 2227), that "it shall be lawful for the *Justices forthwith to commit*," &c. Upon cause being shown, it appears that the case was adjudicated upon, in fact, by the two Justices, and that the omission of the second Justice's signature to the warrant and to the memorandum was accidental merely. A formal conviction, moreover, is produced, under the hands and seals of such Justices, drawn up (as it was clearly in their power to do) since the Rule in this case was served upon them, and a fresh commitment, similarly executed, has been sent to the Keeper of the gaol.

I have thought it expedient, for reasons mentioned by me on the argument, to confer with the other Judges in this case, and the following is the result:—*First*,—We are of opinion that it was not necessary for both Justices to sign the memorandum upon the adjudication, it in fact appearing that such adjudication was by both, upon a hearing before both. *Secondly*,—That the conviction produced before me, the same being in accordance with and founded upon such adjudication, is a valid and sufficient conviction under the enactment. *Thirdly*,—That there is nothing in that enactment requiring the commitment (that is to say, the *warrant* on the adjudication) to be by two Justices. The wording of the enactment is peculiar, but the meaning seems clearly to be, that two Justices

may award a committal. *Fourthly*,—But that, as the warrant here purports to be by two Justices, whose signatures and seals (it is therein alleged) are attached, whereas one signature and one name only appear, the commitment is bad; for it thus cannot be collected that more than one Justice adjudicated in point of fact. *Fifthly*,—We are of opinion that the defect was not cured by the new warrant, for the first alone operated. The second warrant could neither act retrospectively, nor destroy or cancel the first; and two clearly cannot co-exist for one and the same offence.

The Statute, however, (the Justice's Act of 1850), which gives relief against erroneous convictions, confers on the Judges ample power to amend as well any commitment as any order or conviction, where the offence charged shall appear to have been established, and the judgment warranted in substance. Now, there was in this case clear evidence of the offence, and the judgment was correct, not substantially alone, but in form also. The commitment, then, may be amended, not by adding now a second signature, or allowing it to be added, but by making it in terms; according to the fact, the warrant of one Justice only, founded upon the conviction of himself and the second Justice; provided the warrant, if so amended, will then itself be effectual to support the prisoner's detention: We are of opinion that, if so amended, the warrant will be effectual for that purpose. The general rule was, no doubt, that where two Justices only could convict, both of them (the same two Justices) were necessary parties to the commitment. But, by Jervis's Act, sec. 29, it appears to us that in all cases a conviction may be enforced by one Justice only. Notwithstanding the care with which the Statute has been compiled, ss. 23 and 24 seem to be defective, in respect that, although *the convicting Justices or Justice*, (that is, two or more, if so many adjudicated, or the *one* who adjudicated, if only one), or any "*other*" Justice, may by those sections enforce a conviction, the power is not, in the case of two or more convicting Justices, given to *one only of such Justices*. The words should have embraced, specifically, the Convicting Justices or Justice, or any one of them, or any other Justice; and then all doubt would be excluded. The 29th sec., however, we think, extends to all cases, including those mentioned in the 23rd and 24th; and if so, one Justice may, in every instance, enforce a conviction, whether he be a party or a stranger thereto. The warrant in this case may be amended in the manner indicated, and the defendant will be remanded thereupon accordingly.

The SOLICITOR-GENERAL, for the complainant, intimated that it had been determined by his client to appeal against this decision, but that, if it was at once drawn up, the appeal would be in effect defeated, for the respondent had already withdrawn himself from the Colony, and so soon as the formal order of this Court could be obtained, the money and property attached would doubtless be forwarded after him. The learned gentleman asked, therefore, that this order might not be drawn up until leave for an appeal could be obtained.

Mr. DARVALL, for the respondent, contended that the respondent, having obtained the decision of the Court in his favour, was entitled to take immediate advantage of it, and that any delay in the drawing up of the decision would be an undue aid to the other party. A majority of the

Court granted a delay in the drawing up of the order until next day, on the ground that, if this was not done, they would virtually deprive the losing party of the power of appeal against their decision, by rendering such appeal useless. The dissenting Judge (Dickinson, J.) thought the Court would be stultifying itself in making this order after having pronounced a judgment, upon the accuracy of which the members of the Court had no doubt; and, not even to facilitate an appeal to the Privy Council, ought this Court, in his Honor's opinion, to do this.

*Apprentices' Act.*—8 Vic., No 2.—*Ex Parte Erwin*, January 23, 1857.

The following judgment was delivered by the CHIEF JUSTICE :—

This is the case of a *Habeas Corpus* to bring up the body of Patrick Erwin the younger, who has been committed to prison under the warrant of two Justices, for having absented himself (as alleged) from his apprenticeship;—the question raised being, whether the said Erwin was legally bound as an apprentice, and it being agreed that he shall be discharged, should my opinion on that point be in his favour.

The observations made by me in Evennett's case, on a similar application, will explain the object of this preliminary statement. The commitment, however, in the present case, as in Evennett's, is defective; and I am in a position, therefore, to enter into the substantial question affecting the validity of the adjudication, without regard to form, as on a motion for a writ of *Prohibition*. The commitment is bad, for not in any respect following the terms of the enactment on which the conviction is (or ought to have been) founded, namely—the Apprentices' Act of 8 Vic., No. 2, (in *Call*, 1309). The conviction itself, indeed, is not brought before me. But it is clear, from the terms of the commitment and of the information, that the enactment relied on was the Masters and Servants' Act of 9 Vic., No. 27. The last-mentioned Act, however, is not applicable to apprentices, and the commitment here is defective, in not describing the defendant as an apprentice, nor adjudicating distinctly that he was (in so many words) guilty of breach of duty. The enactment, moreover, requires the commitment to be to *solitary confinement*, and the complaint, unless Sir John Jervis's Act has altered the law in that respect, should have been *on oath*. A glance at the Apprentices' Act, sec. 4, will show the defects of the conviction in all these particulars.

As observed by me in Evennett's case, the Court or Judge has no power to amend in such matters, unless the conviction itself be good in substance. Is the conviction here, then, sustainable in substance? I am of opinion that it is not. The objection that the commitment is general, instead of being to solitary confinement, would be sufficient. But as this was not the point taken, I am unwilling to decide the case on that ground. I pass on therefore to the main question,—whether the apprenticeship here ever existed; and, having conferred on this with Mr. Justice Dickinson, and considered it very fully myself, our opinion is, that such apprenticeship never did exist. In the case of *Ex parte Byrne*, in July, 1849, the Court held that sections 4 & 5 of the Act included all apprenticeships, whether the parent or a Justice of the Peace was a party or not to the instrument purporting to bind the individual. We held, also, that a

parent could not bind his child without the latter's assent; and that the child, on the other hand, unless his parent unequivocally dissented and claimed to control the child's person, could effectually bind himself. In the present case, however, no question arises on either of those points. Admitting that the defendant intended, with his father's assent, to bind himself, the question is, whether he *has* so done; and that depends on the indenture by which the apprenticeship is supposed to have been created.

By that instrument, made between Erwin's father of the first part, the son (this defendant) of the second part, and Peter M'Beath of the third, it is witnessed that the father binds his son, and, so far as he lawfully may, Erwin the younger binds himself, apprentice to the said M'Beath, with the usual stipulations for upright and steady conduct; in consideration of which, M'Beath covenants with the elder Erwin, and also with his son, among other things, to pay the latter certain wages, out of which the lad is to feed and clothe himself, in default of which the father covenants to supply him. So that, as it appears to me, Mr. Justice Dickinson assenting, Erwin, the father, was throughout assumed to be, and was, an essential party to the contract. He never has executed the instrument, however, nor was it shown that he has in any way ratified it subsequently,—supposing that any ratification short of executing the indenture would have been sufficient. We are of opinion, therefore, that the apprenticeship never took effect. The son, it is true, executed the instrument, and entered on the service; but these acts cannot give existence to a relation, which was either created between the parties by that instrument, or not at all.

The conclusion thus arrived at obviously would relieve me from the necessity of delivering any judgment as to the validity of an apprenticeship disapproved of and dissented from by the parent. This is a question of equal importance and difficulty, and, with the exception of the case above cited, nothing (I believe) will be found in any authority upon it. That case certainly does not absolutely decide the point, and I reserve my own conclusion upon it until a more appropriate occasion. It is sufficient to say, as to this case, that no evidence was given (or offered, so far as I can discover) of any dissent by the father. But, by the terms of the contract, it was for the complainant to show an express and formal assent, as a condition precedent to the apprenticeship, and failing in that, he fails altogether.

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(*Apprentices*).—*Ex Parte Byrne*, July 25, 1849. (*In re Mobbs*).

The CHIEF JUSTICE delivered the judgment of the Court in this matter as follows:—

The questions raised in this case are of importance, as they affect the law of master and apprentice in this Colony; and we have therefore devoted more time to their consideration than we should otherwise have thought necessary. They arise upon a motion for a *Mandamus*, to be directed to two of the Sydney Magistrates, commanding them to hear and determine the complaint of the applicant against his indented apprentice, under the Colonial Act of 8 Vic., No. 2, s. 5, for absconding from his service. The Justices, conceiving that they had no jurisdiction in the case, by reason of its not being within the 1st and 2nd sections of that

Act, declined to proceed, in order to afford the master an opportunity of bringing the question before this Court for adjudication.

It is not disputed that the instrument is an indenture, or that it is in writing; although, perhaps, either might have been made a question of more validity than the one formal objection raised, namely—that the mother of the apprentice, in the instrument, is said to execute it in testimony of “*his*” assent. This objection, we need hardly say, is quite untenable. It is obvious, from the context, that the mother executed the deed in token of *her* assent; and the mere clerical error, substituting the wrong gender in the possessive pronoun, is therefore of no importance. On the other points, there is nothing judicially before us to call for a decision. According to the affidavit, the instrument purports to be an indenture, and it might therefore, perhaps, be *indented* at any time, if indentation be essential. If the indenture be not wholly *written*, part being printed, we are of opinion that, notwithstanding the words (“legally bound by written indenture”) in the Act, the instrument would not thereby, even in cases within the second section, be rendered inoperative.

There are, however, two substantial objections taken to the indenture. The mother who executed it is admitted to have been at the time a widow, and therefore entitled to execute any such deed, as the boy’s parent. But she does not thereby herself bind him apprentice; nor does the instrument import that he is bound by himself and her jointly. The lad alone binds himself, and she *assents* to such binding. This, it was objected, is not what sec. 2 of the Act requires,—the words there being, “all apprentices legally bound by written indenture, *by their parents or guardians, or other persons,*” as thereafter provided. The other objection is that where, as sec. 1 requires the age of an apprentice to be above *twelve years*, the indenture does not state such age.

There is nothing in the last objection. The first, however, would be a fatal one, if sec. 5 of the Act extended to such cases only as seem to have been contemplated by the second. But it was submitted by Mr. Brennan on behalf of the master, and we think correctly, that, whatever may have been intended by the Legislature, or whatever was their design in the 1st and 2nd sections, there is nothing in the Act to limit or restrict apprenticeships; and that, consequently, the remaining sections extend to every case of legal apprenticeship, (the cases mentioned in sec. 9 excepted), however constituted.

What was, in fact, the object of the second section, we are hardly prepared, nor is it necessary, now to determine. It is peculiarly worded, and leaves the question open to debate, not merely whether a “written indenture” can be dispensed with in cases within that section, but what apprentices will be “legally bound,” and whether they can, by “their parents or guardians” alone, be so bound. And if by any means legally bound, the provision that they shall not afterwards leave their masters was unnecessary. The power of the Magistrates, in like manner, given by sec. 4, is left equally uncertain. Was it intended, for instance, that a lad, having no parent alive, or none resident in the Colony, or no parent or guardian who would act, or from lunacy or other such cause could act, should not be able to bind himself? Or, where there is no parent or guardian, was it meant that, whether the lad consent or not, two Magis-

trates should have power to bind him? Be the cases, however, which these sections were framed to embrace, what they may, it appears to us that secs. 4 and 5 are not restricted to them, but include all cases of apprenticeship valid by any other law.

The 8 Vic., No. 2, does not repeal any of the previous Acts regulating the law of master and apprentice, except as to the punishments provided for misbehaviour; and the 9 G. IV., No. 8, (the 4th sec. of which, it is clear, contemplates the existence of the ordinary law of apprenticeship in this Colony), is left untouched. The 4th and 5th sections, however, of 8 Vic., No. 2, are in the most general words. They provide in terms for complaints against "*any*" apprentice; not merely "*any such apprentice as aforesaid*,"—such, that is to say, as have been bound by written indenture by their parents or guardians, or two Magistrates, or were above twelve years of age when bound. If only such cases had been included, there would have been no means provided by law for punishing absconding or misbehaviour in cases falling within the 10 G. IV., No. 4, or the 5 W. IV., No. 3.

By the law of England, we do not find that the express assent of a parent, previously declared, is essential to an apprenticeship. The father, indeed, or, after his death, the mother or a guardian duly appointed, has ordinarily the care and disposition of an infant's person, and may therefore, we presume, dissent from and repudiate any such contract, to which no assent (expressly or by implication, as by knowledge and acquiescence, or otherwise) shall have been given. It has, however, repeatedly been decided that (subject, we conceive, to the powers of dissent and reclamation just mentioned) an infant may bind himself as an apprentice. We need not cite the cases to this effect, which are numerous. It will be sufficient to mention only *R. v. Arundel*, 5 M. & S., 257, and *R. v. Great Wigston*, 3 B. & C., 484, referred to by Mr. Brenan. On the other hand, a parent cannot by law bind out his child, (notwithstanding an authority in Com. Dig. to the contrary, title "Justices," B. 55), without the consent of the child. This was resolved in *R. v. Arnesby*, 3 B. & A., 585. If, then, the important alteration was intended by the Act in question, sec. 2, that every binding must be by the parent, or guardian (if there be no parent), or that the infant need not be a concurring and executing party in such binding, the will of the Legislature should have been expressed, as to each case, in clear and unambiguous terms.

For these several reasons, we are of opinion that the 5th sec. of the 8 Vic., No. 2, under which the master in this case complained to the Justices, applied to the apprenticeship mentioned in the affidavits; and that, consequently, as the absconding in question was a new or continuing act, in respect of which there had been no previous adjudication, the Magistrates ought to have proceeded to hear and determine the matter of such complaint.

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*Bastard*.—4 Vic., No. 5.—*Ex Parte Simmons*, July 22, 1851. (*Mandamus*).

A rule  *nisi* had been obtained, calling upon J. S. Dowling and Edward Flood, Esquires, Justices of the Peace, to show cause why a writ of *mandamus* should not issue, commanding them to hear and determine a com-

plaint exhibited before them on the 29th January, 1851, against John Gammie, for the support of his illegitimate child.

It was contended by Mr. HOLROYD that the Justices had no jurisdiction. 11 & 12 Vic., c. 43, s. 11, limits the making of the complaint to six calendar months from the time when the matter of such complaint arose; and, as no limitation is mentioned in the 4 Vic., No. 5, it must fall within the rule laid down in the 11 & 12 Vic., c. 43.

Mr. DARVALL supported the rule. These applications are to the discretion of the Court. An injury has been made out by the applicant, and a denial of justice by the Court below. Whether the Justices refused the application or dismissed the case, it is equally an injustice to the present applicant. A *prima facie* case was made out, which must be rebutted by showing that an order had been previously made. Mr. Darvall was then stopped by the Court.

The CHIEF JUSTICE: As to the first objection, it cannot be sustained. As to the Deserted Wives and Children's Act, the desertion, as matter of complaint under the 7th section, arises *de die in diem*. The Magistrates may not have a retrospective jurisdiction beyond six months, but that arises on the supposition that the 11 & 12 Vic., c. 43, applies to the 4 Vic., No. 5. I think, however, that the 11 & 12 Vic., c. 43, applies to cases where the cause of complaint arises and terminates the same day. In this case, one Magistrate says that there had been a previous order and that they had no jurisdiction; the other Magistrate says that there was no order, and that they had no jurisdiction; and, if we had found that an order had been made, the Magistrates would have had no jurisdiction; but no order has been shown to be in existence, and a *prima facie* case has been made out sufficient for us to order a *mandamus* to go.

Mr. Justice DICKINSON and Mr. Justice THERRY concurred.

Rule absolute.

In the course of the day, his Honor the CHIEF JUSTICE expressed his surprise that parties, instead of proceeding by *mandamus* to command Justices of the Peace who refuse to do an act, should not apply to the Supreme Court under the 11 & 12 Vic., c. 44, s. 5. The course of proceeding pointed out by this section of the Act would be more satisfactory to Magistrates and the parties concerned, and his Honor hoped that advantage would be taken of its provisions in cases where formerly a *mandamus* would be applied for.

*Baker.*—6 W. IV., No. 1.—*In Re Godfrey*, September 1, 1857.

A motion by rule *nisi* for a prohibition to restrain proceedings on a conviction under the Act 6 W. IV., No. 1.

The Inspector of Weights and Measures, by a general warrant, had seized, in the appellant's house, a number of loaves of bread, (turnovers), which turned out to be under weight, and the appellant had been fined £36. The grounds of the present motion were, that the evidence showed that the bread seized was fancy bread, within the meaning of the Act.

Their HONORS intimated that they would not trouble Counsel on the question of fact, whether the bread was fancy bread or not, because the Court did not decide, as a Court of Quarter Sessions, on facts where there was a conflict of testimony. The question then was, whether the Inspector was



properly authorized, and they were of opinion that such a general warrant as that under which he acted was good. The case *Hutchins v. Reeves*, 9 M. & W., was decisive. (See "Weights and Measures," *ante*, p. 422).

*Bastard.—Ex Parte Bateman, October, 1854.*

It was held that in affiliation cases the defendant was a competent witness.

*Bastard.—Ex Parte Rose, July 21, 1859.*

The CHIEF JUSTICE delivered the following judgment in this case:—

This case, which is that of a motion for a *mandamus*, was heard before me in Chambers after the rising of the Court on Friday last, and the intervening days have afforded me an opportunity of looking into the authorities.

The applicant, it appears, had complained to the Singleton Bench, under the Deserted Wives and Children's Act of 1840, sections 7 and 8, that one Josephs—whom she alleged to be the father—had left an illegitimate child of hers without adequate means of support; but, as she swears, being without professional advice, she was not aware of the necessity of adducing some corroborative evidence as to the paternity, or that she could examine the defendant himself as a witness; and the case, in the absence of any such corroborating testimony, was dismissed. The complainant, however, shortly afterwards, being prepared with further evidence, again applied to the same Bench; when the Justices present, conceiving that the previous dismissal deprived them of jurisdiction, refused to entertain the matter. She thereupon appealed to the Supreme Court.

The question appears, at first sight, to be a very easy one; but it is not so. It was held in the case of the Justices of Buckinghamshire, 18 L. Jour. Mag. C. 114, (Bail Court, Erle, J.), that a decision in favor of the alleged father, on a complaint by the mother under the English Affiliation Statutes, if on the merits, would be an answer to any second charge against the same person. But, in that case, a second application by the mother to a Bench of Magistrates, after the previous dismissal of a similar complaint, was held valid, and an order of affiliation made by them was sustained, because it had not been shown that such previous dismissal *was* on the merits. On the other hand, there are cases tending to show that ordinarily a dismissal for deficiencies in the evidence is, in legal contemplation, a dismissal on the merits. So, in *Brisby's* case, decided by the Criminal Court of Appeal shortly after that just cited, Baron Parke observes that, where Justices refuse to make an order of affiliation, other Justices may make such an order; but Mr. Justice Patteson doubted whether they could do so if the first complaint had been dismissed on the merits. The Court held, however, that a void order (which is tantamount to no order at all) will not prevent a second application, and the making of a valid order thereon. (1 Den. C. C.) Nevertheless, in the case of *the Queen v. Machen*, determined in the same year, the Court of Queen's Bench deliberately held—after time taken to consider—that a second application to Justices for an order of affiliation was maintainable, whether the previous dismissal was on the merits or not. (11 Q. B.)

It was argued before me that this decision depends on the peculiar provisions of the English enactments, from which our own, respecting affiliation orders, materially vary. But, although noticing the fact that the mother has by those enactments no appeal on a decision adverse to her, whereas the alleged father has an appeal if the decision be in her favor, the Court appears to me to have taken a more extended view of the question, and to have regarded dismissals generally by Justices, (in the case of *orders*, at all events, as distinguished from *convictions*), in the nature rather of non-suits,—after which a plaintiff may always come again when better prepared. The circumstance, that a defendant who is convicted or ordered to pay money has an appeal, but the complainant who fails has none, is not peculiar to the case of women seeking support for their children. In all the Statutes which I can remember, English or Colonial, an appeal is provided only in favour of defendants. The reason of the rule laid down in this last authority, therefore, (following, as it does, a decision in the time of Lord Hardwicke, not cited in the case before Mr. Justice Erle), is of universal application; and indeed Lord Denman, in his judgment, expressly notices the inconvenience generally of repeated applications; but meets the objection by showing that it was no greater in affiliation cases than in others in which, nevertheless, a second complaint might certainly be made.

It is said, however, that "*The Queen v. Machen*" applies after all only to affiliation orders, and that there is a difference between the English and the Colonial enactments on that subject. My reply is, that I have looked into both, and that I discover no difference which can distinguish the cases on this point,—unless, indeed, favourably for the application. In our own Statutes, as in the English, if the mother's complaint be dismissed, she has no appeal. Her remedy seems to be, solely, by preferring a second complaint; upon the hearing of which, however, the fact of the first dismissal will not be without weight. In neither series is there any provision made for an absolute adjudication by the Justices in favour of a party charged; but, in each, if an order be made against him, he may appeal; and a decision by the Appellate Tribunal, it would seem, is final.

The difference alluded to by me is that which arises from Sir John Jervis's Act respecting Summary Convictions and Orders, (the 11th and 12th Vic., c. 43), introduced into this Colony by the Justices' Act of 1850. Now, that Act of 11 and 12 Victoria, I observe, does not extend to any proceeding under the English Affiliation Statutes. (See sect. 35). The reason for this exclusion was, probably, that by those Statutes very minute and special directions and forms had been provided, with which it was thought unnecessary, and perhaps inexpedient, to interfere. But, although the 35th section finds a place in our local code with the rest of the Statute thus bodily adopted, the exclusion is certainly not applicable, either in terms or in spirit, to proceedings under the Deserted Wives and Children's Act, which is the Statute here in question. Assuming Sir John Jervis's Act, then, to govern all proceedings under our own affiliation law, I find in s. 14 a provision,—on which this Court has already had occasion to comment,—which appears to show that the Legislature took the same view of a dismissal by Justices which the Court of Queen's Bench did in

Machen's case the year following; for, by that section, the dismissal of a complaint or information seems clearly to be a bar only when followed by a certificate; which certificate the Magistrates may grant or refuse, as they think fit.

Such was, in fact, our decision in the case of *Ex parte Nixon*, (under the Masters and Servants' Act), on the 12th July, 1858. Where a matter has been fully heard, and all evidence reasonably attainable exhausted, and the facts appear clearly to be in favor of the accused, such a certificate would properly be given. But I conceive that no Justices would feel called on to grant one where the case had broken down merely from an unforeseen difficulty, which may on a second occasion be removed. In *Ex parte Barr*, 20th December, 1858, we held that the dismissal by the Magistrate, it being sworn that such dismissal was on the merits, was an answer to any subsequent proceeding before Justices for the same matter. That, however, was not a case of summary jurisdiction, but of preliminary inquiry only; and, consequently, the 11 and 12 Vic., c. 43, s. 14, did not apply.

I may add that, in proceedings to compel the maintenance of a child, there seems to be an additional difficulty (in the absence, at least, of an express adjudication negating the paternity) in holding one dismissal to be a bar, namely, that each additional act or instance of neglect in the providing of that maintenance, where enforceable at all, forms in itself a new and distinct case.

For the reasons thus assigned, I direct that the writ of *mandamus* applied for do issue. I make, of course, no order as to costs.

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*Butchers (Licensed).*—13 Vic., No. 42.—*Ex Parte Baird*, July 31, 1856.

An application for a writ of prohibition on behalf of Baird, convicted on an information for having (as alleged) slaughtered a calf on his premises, not being a licensed slaughter-house under 13 Vic., No. 42, s. 3. It was objected that the evidence did not support the information, and that according to it the applicant was guilty (if of anything) of causing to be slaughtered, but not of slaughtering, as it stated that the servant-man slaughtered the beast; and as the section of the Act runs thus,—“It shall not be lawful for any person to slaughter, or cause to be slaughtered,” &c. In the disjunctive, the charge of slaughtering could not be sustained. His HONOR ruled that the prohibition must go, the objection being fatal, but without costs.

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*Butchers (Licensed).*—13 Vic., No. 15.—*Ex Parte Cleeve*,—in *Re the Justices of Sydney*, October 14, 1852.

This was a rule *nisi* for a prohibition, the object being to stay proceedings under a conviction (with a fine of £20, and five guineas costs) of the applicant, Mr. Cleeve, under the 6th section of the late Act for preventing the slaughtering of diseased cattle.

The informer in this case had been the Inspector of Slaughter-houses, Mr. Oatley, whose evidence went to show that this carcase was dressed as for human food, although it was highly diseased, and although this fact must have been known to the man who slaughtered the animal. Seeing

this, he condemned the carcase to immediate destruction by fire in the ordinary way, and some hours afterwards it was so destroyed; but the same course was not taken with the spleen, which was set apart with the offal, under another enactment for regulating this kind of business, which allowed twenty-four hours for this purpose. By the evidence for the defence, it appeared that this was one of a lot of cattle believed to be quite sound. Mr. Cleeve was not present at the time the beast was slaughtered, nor until after its condemnation by Mr. Oatley. The actual butcher, a man named Tancred, denied that he had wholly dressed and prepared the carcase like those which were for sale, but admitted that he had partially done so, and did not disprove the statement that he knew, after he had killed the animal, of its being in a diseased state.

The ground of the present application was, that the conviction was against evidence; but the case turned upon two points—first, whether, for the purposes of this particular Act, the spleen was to be considered as part of the carcase; and, secondly, whether the owner or occupier of the slaughter-house was responsible for the act of his servant, even without proof of guilty knowledge.

The Court held, that the decision of the Magistrates was right, according to the terms of this Act; the Legislature must be assumed to have intended that every part of a diseased animal which was slaughtered must be immediately destroyed by fire in the same manner as the remains of the entire animal were to be destroyed when it had died a natural death from the operation of this disease. It was equally clear that the owner or occupier of the slaughter-house was held answerable for the acts of his servants, unless he could prove that he had taken all necessary precaution for the prevention of these offences, such as that he had employed thoroughly competent persons for the conduct of his business, and that he had given strict orders for the immediate destruction, in the manner required by law, of all animals killed there that should prove to have been diseased. The rule must therefore be discharged, and with costs—first, because costs had been asked for against the Magistrates; and, secondly, because the decision of the latter was entirely right.

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*Carriages, Omnibus and Hackney-coach By-law.—Howard v. Moore,*  
April 16, 1859.

This was an appeal from a decision by a Judge in Chambers, sustaining a conviction before the Sydney Bench, under the Municipal By-laws for the regulation of omnibuses and hackney-coaches. By sec. 8 of these By-laws, it was provided that every licensed conductor should be compellable to wear an uniform and a badge. Sec. 12 made the proprietor responsible for the good conduct of the conductor, and for all penalties which such conductor might incur. Sec. 62 imposed penalties of from £10 to 10s. for breaches of these By-laws. The present appellant, an omnibus proprietor, had been proceeded against for the default of a conductor in his employment, who had committed a breach of sec. 8.

The Court sustained the appeal. The offence was that of the conductor, not of the proprietor, and the former must be proceeded against. Until this had been done, and he had made default, the responsibility of the proprietor did not apply.

*Carriages.—Ex Parte Blott v. Stubbs and another, April 16, 1859.*

This was an application for a prohibition to stay proceedings under a conviction before the Sydney Bench. The applicant had been convicted as an omnibus conductor under sec. 34 of the Corporation By-law for the regulation of omnibuses and hackney-carriages, which prohibited all drivers and conductors from "shouting" on Sundays. The information charged Blott that, being "a licensed conductor of a licensed omnibus," he had shouted on a Sunday. The evidence was, that he was a "licensed omnibus conductor," and had called out "Newtown" on a Sunday.

Their HONORS directed the prohibition to go. The information was properly drawn, and was properly sustained, except as to one point. Under the By-laws it was essential that the shouting should be on a licensed omnibus, and of this there was no evidence. The evidence amounted at best only to proof that Blott was a licensed omnibus conductor; but their HONORS were inclined to think that the mode of proving the license either of the vehicle or its conductor should be that prescribed by sec. 59.

*Cattle Stealing.—17 Vic., No. 3.—The Queen v. Walker, October, 1853.*

Prisoner had been convicted of cattle stealing, upon evidence of the following nature:—A hide was found in prisoner's possession bearing a brand said to be that of Mr. Stewart, who was named in the information as the owner of the beast. The prisoner also gave contradictory accounts as to how the animal came into his possession. On the other hand, however, it appeared that six hundred head of cattle bearing the same brand had been sold to some other person or persons, and there was no positive evidence as to whether the animal to which this herd belonged had been one of Stewart's own herd, or one of the cattle which he had sold. The point raised was, that there was no sufficient evidence of the property in Stewart to warrant the finding.

The Court sustained the objection. There was not sufficient evidence to exclude a reasonable doubt as to the animal having been the property of Stewart, and the prisoner was consequently entitled to an acquittal under that information. The prisoner's contradictory statements went to raise a strong presumption that the prisoner had stolen the beast from some one. This, however, would not strengthen the proof as to its having been taken from Stewart's herd, particularly as there was no evidence of loss. As therefore the prisoner ought not to have been convicted under this information, he must be discharged forthwith.

*Cattle Stealing Prevention.—17 Vic., No. 3.—In Re Application of Rusden for a Prohibition, 24th April, 1860.*

This was an application for a writ of prohibition to the Magistrates at Armidale, to stay all proceedings under an order made by them under the 17 Vic., No. 3, for delivery of a horse. By this Act two Justices had power to direct the restoration of any animal shown to have been stolen within twelve months prior to the time of application on oath for such restoration. The applicant to the Armidale Bench had sworn to the right of ownership in the horse, but Rusden had positively denied the sale, and there was a dispute as to the right of ownership. The only question was

as to whether there was any evidence on which the order could be sustained; and, if not, whether there had been any such corruption or gross ignorance as would warrant the imposition of costs upon the Justices.

Their HONORS held that this injunction must go. From the evidence it was quite plain that Rusden had acted in a manner inconsistent with the fact of his having taken the horse *animo furandi*; and if he had taken the animal under the persuasion, even although erroneous, of its being his own property, the Magistrates had no jurisdiction under this Statute. The question then became one determinable by civil action. But the evidence was not so distinct as to negative the presumption of a *bonâ fide* belief on the part of the Magistrates that they were deciding rightly; and there was no evidence whatever of any corruption or partiality. The prohibition must therefore be granted without costs.

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*Cattle Stealing, Disputed Ownership.*—17 Vic., No. 3.—*The Quern v. Preston*, April 25, 1857.

This was an application for a writ of prohibition to set aside a conviction under 17 Vic., No. 3—the Act for the prevention of cattle stealing. The applicant had been sentenced to a penalty of £10 and costs for having a mare in his possession the property of one Nowlan, which he alleged he had purchased from Nowlan's son. The ground of objection therefore was, that this was a mere case of disputed ownership, to which this Act was not meant to apply, the proper course being to proceed in trover. The answer to this objection was, that there was no evidence of the facts relied on but the statement of Preston himself. On the other hand, however, this statement was not distinctly rebutted. The plain facts were these: Preston was an innkeeper, with whom the younger Nowlan had run up a grog score. He had taken from the latter the mare in question in payment. The elder Nowlan claimed the animal, because he had cautioned all parties by advertisement from taking property from his son. Preston, however, not only refused to give it up, but resold it.

The Court made the rule absolute.

There was a second application for a writ of prohibition by the same defendant, Preston, arising out of a different transaction—a conviction under the same Statute for illegal possession of ten head of cattle. The point raised was, that the question, as in the former case, was one of disputed property only. The defendant claimed to hold possession under an agreement with one Hayes, and the main dispute was as to the identity of the animals. As to nine, the evidence showed that the question was really one of disputed ownership; but as to the ownership of a tenth animal, the evidence was positive.

Their HONORS set aside the conviction as to the nine animals, but upheld it as to the tenth, and made a proportionate reduction of the penalty and costs.

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*Disorderly House.*—See *R. v. Rushton*, *post*, "Evidence."

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*Distillery (Licensed).*—*In Re Williams*, August 28, 1858.

Their HONORS gave judgment in this case—an application for a prohibition against certain Justices at the Water Police Court, to stay all further

proceedings under a conviction of the applicant, for having on his premises a still without being licensed. The CHIEF JUSTICE and Mr. Justice DICKINSON were of opinion that the prohibition must go. The conviction was clearly one under the Distillation Act, sec. 3; but the information here merely charged the defendant with keeping an unlicensed still, while the offence for which this section imposed a punishment was that of keeping an unlicensed still *for the purpose of distilling, rectifying, or compounding spirits*. The use of the still in the manufacture of *spirits* was the *gravamen* of the offence, and should have been distinctly charged. The mere keeping of the still for innocent purposes—such, for instance, as the temporary possession of it by the manufacturer, or its use to distil salt water into fresh—would be no offence under this Act; and there was no averment in the information to negative either of these presumptions. It might have been that the framers of the Act and the Legislature had intended to make the mere keeping of an unlicensed still an offence, but in no part of the Act, reading and construing each part in reference to the whole, could this intention be discovered. Their HONORS went through the various clauses and schedules of the Act *seriatim*, to show that it must be interpreted as an Act against the unlawful manufacture of spirits, and that it was the keeping of a still for this use only which would constitute an offence punishable under the third section.

Mr. Justice TERRY was of opinion that the Act was intended to prevent unlawful and unlicensed distillation in any shape or upon any pretence, and that the mere fact of possessing an unlicensed still should be held sufficient *primâ facie* evidence of an intention to use it unlawfully. Consequently, that it was sufficient to allege and prove this possession. If there was not this *primâ facie* assumption, the whole object of the Statute would be defeated, as any person in whose possession a still was found would only have to say that he kept it for distilling fresh water from salt.

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*Distress,—Rent and Replevin Act.—Ex Parte Cockburn, July 30, 1847.*

The following is the judgment of the CHIEF JUSTICE in this case :—

This is an application, in Chambers, for a prohibition under the Justices' Act of 1850, to test the legality of a conviction of the defendant under the Rent and Replevin Act of 1851, sec. 22. It is by that section enacted, that any bailiff (or person acting as such) distraining for rent who shall *charge more for any distress than is authorized by the Act*, shall be liable to a penalty not exceeding fifty pounds, to be recovered in a summary way *by the party aggrieved* before two Justices. The Act contains no provision for recovery of the penalty, or for the mode of proceeding in respect thereof. But, by the "Summary Proceedings Act of 1835," power is given to the convicting Justices, in all cases where no particular mode is directed, to cause the penalty and the costs attending the conviction to be levied by distress; and, if there be no sufficient distress, then any Justice may commit the offender to gaol for a specified time, varying according to the amount of the penalty. (See 5 W. IV., No. 22, *ante*, pp. 243, 244).

The defendant in this case, being employed as a bailiff to distrain on the goods of one Graham for rent due by him, charged an extra guinea for his trouble, alleging that it was exclusively for extra work under-

taken by him, and not for making the distress. Graham, however, prosecuted the defendant for the overcharge, and the Justice fined him twenty pounds, with two guineas costs, and ordered that, in default of immediate payment of those sums, the defendant should be imprisoned for the space of one month. He thereupon obtained an order *nisi* for a prohibition on the following objections:—1st, That the information did not specify the amount of rent, nor the place where the distress was taken. 2nd, That the amount of fee charged was not specified either in the information or conviction. 3rd, That the conviction adjudged imprisonment as well for the costs as for the penalty. There was another objection taken, but admitted on the argument to be untenable.

I am of opinion that it was not necessary to specify the amount of rent, or of the fee charged. It is sufficient, I conceive, to allege, as in the conviction, that the defendant distrained as a bailiff, and that he charged more for such distress than was authorized by the Statute. In point of fact, there was on the evidence no doubt of the overcharge, if the excess was not for extra labour performed at Graham's request. The circumstances which showed the fact of overcharge, or that less was legally payable, need not to have appeared in the conviction, and therefore certainly not in the information. I think it sufficient to say, on this point, that the cases to which I was referred, cited in Paley on Convictions, 4th ed., 173 to 180, do not apply. There was here no *legal result* or *legal question* to be ascertained. The question of excessive charge depended merely on this—what was the amount of the levy? As to the next objection, the place of the distress, though not stated in the information, is specified in the conviction. But, if either of these objections had been sustainable, I should have allowed the conviction to be amended, under the powers conferred by the Justices' Act.

If the Justices had power to award imprisonment at all, in and by the conviction, I am clearly of opinion that they had the power equally in respect of the costs as of the adjudged penalty. The case relied upon for the defendant of the *Queen v. Barton*, 13 Q. B., 389, does not apply. It was clear in that case that the offender was to be put into the stocks by way of *punishment*, unless he should previously pay the fine; for such was the express provision of the Statute by which the fine was imposed. To inflict that punishment, therefore, in respect also of the non-payment of the costs, (which themselves were first given by a subsequent Statute), was manifestly illegal. In the present case, however, the Act which created the offence provides for no punishment other than the fine; and the imprisonment, if authorized at all, is plainly a mere mode of recovering that fine; for, on payment thereof, and of the costs, the defendant would be entitled to his discharge. But, in Barton's case, the Statute imposes the punishment of the stocks absolutely in *lieu* of the pecuniary penalty, and in lieu of that alone.

The specific objections to this conviction therefore fail. It is nevertheless very difficult to see that any adjudication whatever of imprisonment, on the face of the conviction, either for the costs or the fine, is warranted. Jervis's Summary Proceedings Act, adopted by the Justices' Act of 1850, does not repeal the Summary Proceedings Act of 1835. But, by the latter Statute, this conviction could not be supported; for, in the first place,



the defendant is by that Act allowed one week to pay the fine, and the adjudication of imprisonment can only be after the return of the warrant of distress. This appears clearly by the words of the first section, and by the form of conviction given in the schedule. The conviction, in the present case, however, adjudges the quantum of imprisonment at once, and directs both fine and costs to be paid forthwith. Under what enactment, then, can that important part of the conviction be sustained? It is much to be regretted that the point should admit of any doubt; for almost every conviction, I believe, is drawn up in the same manner. But Jervis's Act, admirable as it is for comprehensiveness, is so elaborate in structure as not to be very intelligible in all its parts, and I sadly fear that some of its provisions have been misunderstood. The 17th section may perhaps be relied on. By that section it is made lawful for Justices to draw up their conviction in *such one* of three Forms (given in a schedule) *as shall be applicable* to the case. In one of these Forms there is an adjudication of imprisonment in default of sufficient distress, and there is a previous adjudication of distress in default of payment of either the fine or the costs. But the question is, what makes that Form applicable to a case like the present? The schedule professes to supply a *Form* only, and nothing more; it contains no enactment, nor does the 17th section, conferring the power of distress or the power of imprisonment. Both are important powers, and cannot be attributed to any tribunal without express words, or necessary and unavoidable intendment.

It seems clear to me that the schedule alone was not considered by the Legislature as conveying any power beyond that of using a prescribed *Form* in the exercise of existing powers. In sec. 18 power is given to award costs to the prosecutor; which costs are to be specified in the conviction, and shall be recoverable in the same manner as the penalty. By s. 19, provision is made for the issuing and execution of warrants of distress in cases where, by the Statute authorizing the conviction, the penalty may be levied by distress, or where, by such Statute, no mode of recovering the penalty is provided. But, if the defendant states that he has no goods, or the Justices think that a distress warrant would be ruinous, then he may be imprisoned for such time and in such manner as *he might have been by law* in case such a warrant had been issued, and no goods been found thereunder. So, by s. 21, if the warrant of distress be returned *nulla bona*, a warrant of committal to goal may be issued, directing imprisonment for such time and in such manner as is directed *by the Statute authorizing the conviction*. Again, by s. 22, provision is made for the specific imprisonment of offenders, *where the Statute creating the offence has authorized* the issue of a distress warrant, but has supplied no further remedy. But here, as has been seen, the Rent and Replevin Act has not authorized the issue of a distress warrant; so that, although under s. 19 such a warrant might issue, no ulterior process seems to be provided for. Lastly, by s. 23, warrants of commitment are provided for in cases where a Statute directs the imprisonment in the first instance, on non-payment of fine.

All these enactments appear to me to show that neither the remedy of distress nor of imprisonment was *created* by the schedule, or by s. 17, referring thereto; but that the schedule was intended only to indicate a

Form to be used where those powers had already been given—that is, either by the Statute which created the offence, or by some other Statute equally applicable. If this be not the true construction of s. 17 and the schedule, what is to be the limit of the term of imprisonment, there left blank? It never surely can be supposed that, in default of sufficient distress, a power of *unlimited* imprisonment was given. Again, when is the imprisonment to be with hard labour, and when without? There is nothing in Jervis's Act to determine these questions.

It will be observed that I am not now considering the question whether Justices have power to issue a distress warrant, or to imprison the defendant should that process prove ineffectual; but, simply, whether they can (except where some Statute expressly authorizes it) direct imprisonment *by the conviction*, and before the issue of any such warrant. I am of opinion, for the reasons given, that the convicting Justices have (except as aforesaid) no such power. It is not conferred, I think, by Jervis's Summary Proceedings Act. I cannot see that the power is conferred, in a case like the present, by any other Statute. The conviction of Cockburn, therefore, in respect of its directing prospectively imprisonment, as well as the issue of a distress warrant, is, in my opinion, bad. In directing the *latter*, the conviction appears to me to be simply inoperative; for the remedy by distress, created either by the Statute authorizing the conviction, or (as here) by s. 19 of Jervis's Act, receives neither efficacy nor strength from such a direction. It may be proper in point of form, as introductory to the award of *imprisonment*; but is not proper, I conceive, where (as here) the convicting Justices cannot award imprisonment. So, as it strikes me, it is unnecessary to award that the fine shall be paid *forthwith*; for, where the Act of 1835 does not give a week's credit, the money is payable immediately as a matter of course.

If I am wrong in these conclusions, the sooner the point shall be raised for more solemn argument and decision by the full Court, the better for the Magistracy and the public. If, on the contrary, my conclusion be right, some amendment of the Summary Proceedings Act should, without delay, be sought from the Legislature. In the meantime, the Act of 1835—if the Form of conviction, and mode of proceeding thereupon, prescribed by that Act be followed—may perhaps be found efficacious; or the remedy of distress alone, given by s. 19 of Jervis's Act, may possibly, in the majority of cases, suffice.

The conviction appears to me to be faulty also in not distinctly showing that Graham was the prosecutor,—he being the *party aggrieved*, and therefore the person entitled by the Act to "recover" the penalty. But, as the fact of his being the prosecutor appears on the evidence, and may be collected from the award of costs to him by the conviction, I have no difficulty in allowing the record to be amended, by inserting an allegation that Graham was the party aggrieved and prosecutor.

I am further of opinion that an amendment should be allowed under sec. 10 of the Justices' Act of 1853, by striking out the award of imprisonment and of a distress warrant. It appears that in fact the fine and costs have been already paid, so that neither of those alternatives is now of any importance. I think, therefore, that "consistently with the merits of the case," the error in question may be corrected; and I direct it, on payment

by the prosecutor of five pounds towards the costs of this proceeding, to be corrected accordingly. If that amount be not paid within one week, the prohibition will issue, with an order for the return of the fine and the prosecutor's costs forthwith.

One other point remains to be noticed. It was objected, on the first hearing of this case before Mr. Justice TERRY, that the defendant had become insolvent, and could have no right therefore to a return of the fine and costs; whence it was argued that his assignee ought to be a party to this proceeding. I am not of that opinion. But, practically, the point now is of little moment. Should the assignee think fit to demand the money upon the quashing of this conviction, there is nothing expressed here which can prevent his so doing.

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*Evidence, Identity.—The Queen v. Abbott, October 25, 1854.*

This was an objection to a conviction for assault, said to have been made on one John Connor, and there was no evidence that this person's name *was* such, except that he had made no objection to being so designated. The question was, whether this proof of identity was sufficient. Their HONORS held that it was not so, and that the conviction being therefore unsustainable, the prisoner must be discharged.

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*Evidence.—The Queen v. John Rushton, October 25, 1859.*

This was a special case from the Quarter Sessions, to determine a question of law arising out of the conviction of one John Rushton for keeping a disorderly house.

Mr. Justice DICKINSON now delivered the judgment of the Court herein as follows:—

In this case the point for decision was, whether the evidence proved the defendant to be the manager of the houses, or was merely the landlord of them. It is clear that, if he was only the landlord, the conviction cannot be sustained. Mr. MILFORD, for the defendant, contended that it was equally consistent with the facts proved that the defendant was landlord as that he was manager of the house, and that, as both conclusions followed from the evidence, it proved neither of them, and therefore that the Jury should have been directed that there was no case against the defendant. It is certainly laid down that, in cases of circumstantial evidence, the conclusion drawn from the premises assigned as its basis must satisfactorily explain and account for all the facts, to the exclusion of every other reasonable solution. (*Wills on Circumstantial Evidence*, Ed. 1, p. 187—8).

We are of opinion that this is a rule applicable only to an inquiry as to who was the perpetrator of an act in a case where there is no direct evidence as to who was the delinquent, and the guilt of the accused is a matter of inference only, from circumstances distinctly proved. In such a case, (to use the language of Mr. Justice BYLES, in the case of Jones, reported in the *Empire* last week), "the circumstances are like silent witnesses pointing to the accused; but, if they point in more directions than one, they establish no legitimate conclusion." But in this case the evidence is direct that the defendant did and said certain things, from which the nature of his relation to the house wherein the girls lived was as fairly inferrible by the Jury

as his intent, had he been indicted for wounding with intent to do grievous bodily harm, would have been upon proof that he had wounded another in a struggle, though the evidence might be consistent alike with his guilt and with his wounding in lawful self-defence. We are of opinion that there was ample evidence for the Jury to decide that the defendant acted in the management of the house, and a conclusion that he was only the landlord cannot be reasonably deduced from the evidence. The demands for money, and the injunctions on the females to procure it, are clearly evidence that the defendant was the landlord; but his apprehensions about the constable seeing him take the money, and his telling the officer, "You know I don't keep the house, but, as it is a nuisance, I have shifted the girls this morning," are, we think, strong evidence that he exercised a control over the females, though he lived in a different house. His fear of legal proceedings, and his expression "I have shifted the girls," appear to us to warrant the Jury's conclusion that he was the manager of the house in which the women lived. We are of opinion, therefore, that the conviction must be upheld.

*False Pretences.—The Queen v. Hainess, October 26, 1859.*

This was a special case for the opinion of the Court, under the Act giving power for the reservation of legal points in Crown cases. The ATTORNEY-GENERAL supported the conviction; Mr. BLAKE appeared for the prisoner.

The case stated that the defendant was indicted for obtaining money under false pretences. It appeared in evidence that the defendant owed a small sum of money to a tradesman, and in payment thereof gave him, on a day in July, 1858, a post-dated cheque on the Commercial Bank. The defendant had no funds in the Bank when he gave the cheque, or on the day of its date. He had, however, had an account at the Bank, but had no funds since the 1st May, 1858. The defendant was found guilty, and sentenced to three years' hard labour on the roads, &c. After sentence, Mr. BLAKE asked the presiding Judge (Mr. Justice DICKINSON) to reserve for the Court this question, "Can the conviction be sustained for obtaining money under the false pretence of an existing fact?"

The preliminary objection was first argued, that the Court only having power under the Statute to reserve a special case on points raised during the trial, the objection in the present case, having been raised after sentence had been passed and the trial ended, was taken too late.

Their HONORS held that the objection was not taken in time to give the Court jurisdiction under the Act; but, before the Act, it was the practice of the Judges in consultation to consider any points raised, for the purpose of deciding what recommendation they could make to the Government as to the granting of a pardon. Their HONORS would now, as in consultation, be willing to hear counsel.

After Mr. BLAKE's argument, however, the CHIEF JUSTICE said that the case was too plain for the Court to require any argument from the ATTORNEY-GENERAL. The case of the *King v. Harpur* was not distinguishable from the present. In this case there was a person, who had no account with the Bank, whose account had been closed, and who had no reason to suppose that it would be re-opened, drawing a cheque and

receiving money for it. The fraud must depend upon the condition and state of the man's mind, as shown by the existing state of facts. The test was, whether there was a false pretence of the state of facts raising expectation in the mind of the recipient. It was not necessary that anything should be said. There was the case of the young man who, not being a student, went into a tradesman's shop in Oxford in a student's cap and gown, and who, without saying that he belonged to any college, obtained goods. There was a false pretence, and the man was properly convicted. That in this case the prisoner said nothing when he gave the cheque, his HONOR considered one of the strongest circumstances against him, from the facts proved. The prisoner did by his conduct represent that there was a state of things existing whereby the cheque was a good and valid order for money, when such a state of circumstances did not exist; and that was a fraud within the meaning of the Statute.

Mr. Justice DICKINSON said that the law presumed that every person intended the natural consequences of his own acts. From the state of things represented by the prisoner's acts, the tradesman was led to think that he was getting an order of the value of £6. No such state of things really existed. All the transactions of the prisoner with the Bank were finished and closed up. The case of *Rex v. Harpur* was exactly in point. The evidence here was sufficient to warrant the verdict, and their HONORS could not recommend the prisoner for a pardon.

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*Gaming House.*—14 Vic., No. 9.—*R. v. Butterworth*, February 21, 1851.

[Reported in *Nichol's Justice*.]

The prisoner, one Butterworth, had been convicted, on 1st February, 1851, of keeping a common gaming-house in the town of Windsor, in violation of the provisions of 14 Vic., No. 9, sec. 1, and sentenced to be imprisoned in Parramatta Gaol and kept to hard labour for a period of three calendar months. A writ of *Habeas Corpus* having been granted, the prisoner was brought up before his Honor the CHIEF JUSTICE, in Chambers, on the 21st of the same month.

Sir ALFRED STEPHEN, C. J., gave judgment as follows:—

"I have considered the objections to the conviction and commitment in this case, in connection with the Act 14 Vic., No. 9, and the decisions on the subject of gaming and common gaming-houses, as also in connection with the Gaol Act, and Schedule thereto, and the following is my judgment on the several points:—

"The 14 Vic., No. 9, appears to be only a copy of the recent English Gaming Act, but it is, nevertheless, one of the most perplexing enactments I ever read. Its provisions, therefore, are very difficult to be understood, and the cases under the previous Statutes (I have seen none under the new law) do not afford any guide. It is quite possible, therefore, that a different opinion may be formed as to the true construction of this confused piece of legislation; and for this reason, as the subject is important, it may be desirable to obtain at an early day the decision of the full Court upon it.

"It does not appear by the warrant or the conviction that Butterworth was a person 'found' in a gaming-house, or 'brought before' the Justices

under a search warrant; and it is not stated, nor is it the fact, that he was convicted on any 'information' laid before them. But, by the depositions and other proceedings before me, it appears that he was so found and brought; and therefore, in my opinion, (on the best consideration I can give the Act, more particularly in its first section), it was *not necessary* for the prosecutor to proceed by information. Consequently, I should allow the conviction to be now *amended*, (under the late Act, 14 Vic., No. 43, sec. 9), by inserting therein the facts in question, were it not that there is another *defect* presently to be mentioned, which no amendment in my power to authorize could remedy.

"I think nothing of the objection respecting the substitution of Butterworth's name for Freeman's in the search warrant. The substitution operated nothing, for the warrant had then already done its work. Neither was it necessary in the search warrant, or in the complaint and information on which it issued, to mention any name. That information, on the other hand, was not one which could have supported any conviction, because it was merely the initiatory step for procuring the search warrant; and it was for that purpose (I may observe in passing) unnecessarily positive, since the Act only requires *reasonable suspicion and common report* to justify such a warrant.

"Whether the keeper of a gaming-house could be convicted under 14 Vic., No. 9, in any case where no search warrant had previously issued, is (on the peculiar wording of this enactment) a very doubtful question. I am not bound, however, to give any opinion on that point. He would still be open to prosecution at the Common Law.

"Notwithstanding the difficulty introduced by the use of the words 'unlawful game,' in ss. 2 and 4, I am of opinion that a 'common gaming-house' is one in which games are commonly played with cards, dice, balls, or other implements ordinarily used in gaming, whether such games be in themselves unlawful or not,—such games being played not merely for the recreation of the keeper or his family, and being played 'habitually' or 'very frequently'; and I think it immaterial, if so played, whether they be for any stake or wager or not. By sec. 3, no proof of playing for a stake or wager is required. There is nothing said, as in sec. 4, about *prima facie* proof. And in this same sec. 4, the finding of any such cards, dice, or balls upon a search warrant, as here, is evidence (till the contrary be shown) that the house was, in fact, a common gaming-house.

"The point is one, however, I admit, of great doubt. Sec. 3 would seem, moreover, not to apply to the present case; because Butterworth was not prosecuted on indictment or 'information,' as already observed. But as *balls* are expressly called implements of gaming, and as I can find no definition of what is an 'unlawful' game, (for all playing is gaming, or not, according to circumstances, and gaming becomes then only unlawful in the individual playing (except in 'a common gaming house') when it is for excessive stakes, or otherwise than *bonâ fide* for recreation), I think that the unlawfulness of the game in itself at which the parties played in this case was not a question for inquiry. Why the words 'unlawful game' were introduced, I confess that I cannot understand. A solution may be found, perhaps, on some future occasion.

"The only remaining objection, therefore, is that which respects the

particular gaol to which Butterworth has been committed ; and this, however irrespective it may be of the merits of the case, I am of opinion, cannot be got over. The Gaming Act requires that the commitment shall be to the nearest gaol. The offence, if committed at all, was committed in Windsor, and the conviction was in Windsor. Now, by the Gaol Act, (of which we are of course bound to have knowledge), there is a public gaol established at Windsor. There is no power given by the Act to discontinue any gaol so established. The Governor may appoint new gaols, but no power is given him to abolish any of the existing gaols. Now, it is suggested, and the fact may be so, that there are no officers at the Windsor gaol, and that, practically, it has been abolished by the discontinuance of the building for gaol purposes. But, supposing all this to be true, (of which I have no knowledge whatever), the Magistrates should have made it appear distinctly on the proceedings, and have stated that in truth Parramatta was the 'nearest' gaol. Possibly this might have removed the objection. I do not say that it would, for the point requires consideration. The Legislature has, by express enactment, established a gaol at Windsor, and has never by any other enactment abolished that gaol. Can the Judges hold, in such a state of things, that merely because there is no actual gaol establishment there, a man can be sent to the '*next* nearest' gaol? Had the Windsor gaol been burned, or otherwise made non-existent, the 'nearest' gaol would have been Parramatta, doubtless. But whether the absence of officers deprives the building of its character as a gaol, *that character having been assigned to it by an express enactment still in force*, I do very much question.

"It is sufficient to say, however, at present, that the necessary facts to raise that question are not before me. The prisoner, therefore, must be discharged."

*Gaming House.—14 Vic., No. 9.—In Re Cullen.*

In this case, James Cullen the younger and seven others had been convicted, being found in the room (kept by Butterworth, as stated in last case) where gambling was going on, without lawful excuse. An application for a writ of prohibition was made on several grounds, but those relied on were—1st, That there was no information or complaint on oath before the said Justices to warrant or support the conviction ; 2nd, That Cullen and the others were not summoned before the said Justices, and that the said proceedings against them were had and taken without their having been summoned to appear before the said Justices ; and 3rd, That Cullen and the others were called upon to plead severally, and did plead not guilty, and that the evidence was taken upon the issue so then joined ; but that the witnesses said to have been examined upon the said issue, and upon whose evidence they were convicted, were sworn and examined as witnesses against Cullen and the others jointly.

Sir ALFRED STEPHEN, C. J., gave judgment as follows :—

"This was an application under the 12th clause of the Act of Council, 14 Vic., No. 43, for a prohibition. The defendants had been convicted of a breach of the 1st section of the 14 Vic., No. 9, called the Games and Wagers Act, for being found in a certain common gaming-house. The offence of the keeper of the gaming-house was punishable on a sum-

mary conviction, by the infliction of a penalty or the committal of the offender to the nearest gaol, and all the parties were liable to be apprehended under warrant. The principal might be taken before the Justices, and punished as therein directed; but, with reference to the persons found in a gaming-house, it did not appear from the Act that they were to be taken before a Magistrate and there dealt with; therefore it became necessary to look at the 10th clause, which described the manner in which proceedings should be taken for the recovery of penalties. That clause directed 'that in all matters not specifically provided for' proceedings should be taken as directed by the Summary Jurisdiction Act, 5 W. IV., No. 22, now altered by the recently adopted Act of Parliament, 11 and 12 Vic., c. 43, s. 1, which required an information and summons. The Judges were of opinion that, as this provision had not been complied with, the rule for a prohibition must be made absolute. Another point argued by Mr. HOLROYD was, that, the offences being several, the defendants had been jointly convicted. It was true that several convictions had been subsequently drawn up, but there was but one charge made against all the defendants, one set of depositions taken, and one adjudication. It was improper that all the defendants should have been tried together, as one might otherwise have given evidence for the other. The Court had upheld the same principle before, in the case of Mr. Lawson's Chinese, brought before the Judges by *Habeas Corpus*, and the legality of that decision could not be doubted. The Court directed the writ of prohibition to issue, and, in the meantime, all further proceedings upon the convictions to be stayed."

*Gaming Houses, Games and Wagers.*—14 Vic., No. 9.—*The Queen v. Dixon, alias Rogers*, July 1, 1853.

Mr. FOSTER moved to make absolute a rule *nisi*, calling upon the Police Magistrate, and two other Justices who acted with him (Messrs. Huntley and Chambers) in convicting defendant of being in a gambling-house in King-street, to show cause why they should not be restrained by prohibition from proceeding further under this conviction, and why the same should not be quashed.

The SOLICITOR-GENERAL applied for a postponement of this case, being (he stated) unprepared to argue it without time for further consideration. The applicant had been convicted on the 14th June last, but had not made his application to the Court until the 25th, thus taking eleven days to prepare his case and instruct Counsel. The applicant, having been convicted by a Court of competent jurisdiction, must be supposed *prima facie* to be guilty; and, under such circumstances, the fact of his being in prison ought not to warrant the hurrying on of this case in such a manner as that the Magistrates and the Crown should be unprepared to argue the points which the convicted person had caused to be raised.

Mr. C. H. CHAMBERS, one of the convicting Magistrates, joined in this application for a postponement, repeating the argument, that the applicants must, for the present, be presumed to be guilty, and contending that, if Magistrates could thus summarily and without time for preparation be called upon to answer some twenty technical objections, the interests of the public must suffer.



Mr. FOSTER insisted upon his right, under the rule of Court, to press the cases.

The SOLICITOR-GENERAL then proceeded to go through the notice, the depositions, &c. The case of the applicant was one among several prosecutions which followed the discovery of the King-street gaming-house. The grounds of the present application were very numerous, and all of a technical nature, having reference to errors and irregularities, or alleged errors and irregularities, in the proceedings. Their substance was, that there had been no definite charge as to whether Rogers was accused of acting in the management of a gaming-house, or simply of being present there, although he was convicted of the former offence, and sentenced under it to four months' imprisonment with hard labour; and that there had been various irregularities, as well in the course of the proceedings as in their initiation and close, and that the evidence did not warrant this conviction. There had been no written information nor summons, but the party was apprehended and bailed, and on his subsequent appearance proceedings were at once gone into, in the course of which his legal adviser was told in open Court, by the prosecuting Attorney, what was the charge upon which a conviction was sought for. This, it was contended, was sufficient, and the evidence commented upon in detail to show that it sufficiently maintained the charge alluded to, and that the decision of the Magistrates ought not to be disturbed.

Their HONORS were of opinion that the rule in this case must be discharged. Admitting, for argument sake, that the warrant and all the preliminary proceedings had been as irregular as was alleged, all this irregularity was waived when defendant, being asked whether he had anything to urge why he should not be convicted of this offence, replied in the affirmative, and proceeded to go into the case. Here was evidence to substantiate this charge, and the conviction, being thus maintainable, could not be destroyed by a mere mis-recital in the statement of offence whenever the Magistrates had taken evidence and pronounced a decision. Their HONORS consequently directed that the amendment should be made, and that the rule should be discharged; but that, as the proceedings had been so drawn as to invite discussion, it should be discharged without costs.

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*Gaming.*—14 Vic., No. 9.—*The Queen v. Gaynor*, October 26, 1860.

Mr. Justice WISE delivered the judgment of the Court in this case as follows:—

This was an application for a prohibition made by Mr. STEPHEN, against which Mr. ISAACS and Mr. BUTLER showed cause.

The application was apparently under the Justices' Acts, 1850 and 1853, but, upon the objection being taken by Mr. BUTLER that the ATTORNEY-GENERAL was entitled to notice, because the Crown was interested in a moiety of the penalty, we held that the application could not be maintained under the Statute.

Mr. STEPHEN then claimed to treat it as an application for a prohibition at Common Law, as was done in Williams's case in 1858.

We are of opinion that the Common Law right of prohibition is not taken away by the Statute, which gives a cumulative remedy, partly in the

nature of an appeal, and partly in the nature of a prohibition. It appears from the affidavits that the proceedings complained of are not yet concluded, no formal conviction having been drawn up or fine enforced ; and, without giving any opinion whether this writ would lie where the party convicted was under sentence, we are of opinion that the prohibition is in time in the present instance.

The question, then, for our determination is, whether, under 14 Vic., No. 9, a person can be convicted summarily of the offence of being in a gaming-house, if that house has not been entered under a warrant granted as provided for by the Statute.

Now, as no offence can be the subject of a summary conviction except by a special Statute, the question depends upon the proper construction of the first section of the Act already referred to. As has been often stated, the leading rule for the interpretation of Statutes is to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the Statute itself, or leads to any manifest absurdity and repugnance.

Applying this rule to the earlier part of the first section, we have come to the opinion that the keeper of a gaming-house is not liable to the penalties imposed by that section unless the house has been entered by a warrant.

The Statute does not enact, as the marginal note (which is no part of the Statute) alleges "that the owner or keeper of a gaming-house shall be liable," but that the owner or keeper of the *said* gaming house ; and that, on the conviction of any *such* offender, all the moneys, &c., seized as aforesaid shall be forfeited to Her Majesty, and every person found in *such* house shall be liable to a penalty.

"The said gaming-house" are plainly words of reference, and the early part of the section empowered any Justice, upon complaint on oath that there is reason to suspect any house, &c., to be kept or used as a common gaming-house, and that it is commonly reported, and believed by the deponent, so to be, to give authority by special warrant to any constable, &c., to enter into *such* house, &c., and to arrest all such persons found therein, and to seize all tables, &c., found in *such* house, and to seize all moneys, &c., found therein.

The owner liable to conviction, therefore, is the owner of a house entered under that warrant, the Legislature not unreasonably requiring that there shall be the oath of some person before the large powers given by the Act could be exercised, or the heavy fine inflicted.

It is evident that the forfeiture of the money seized is part of the consequence of a conviction, and, as no seizure can be made without warrant, there can in like manner be no conviction.

This was the opinion entertained by me upon a case heard before me at Bathurst, in which opinion the Acting Chief Justice concurs.

The next paragraph is that upon which the present conviction is attempted to be supported, viz., "That every person found in *such* house, room, premises, or place, without lawful excuse, shall be liable to a penalty." "Such house" are, like said gaming-house, plainly words of reference, and can only mean such house as that mentioned in the previous

part of the section, which we have seen is a gaming house entered by a warrant.

It is to be noticed that this construction is much fortified by the power given to bring persons found in such houses before the Justices, and by the fourth section, which enacts, "where a warrant is duly obtained under this Act, and a house is entered in pursuance of such warrant, that the mere finding of any cards, dice, balls, counters, tables, or other instruments of gaming in the suspected house, or about the person of any of those found *therein*, will be sufficient evidence, unless the contrary can be proved, that such house, &c., is used as a common gaming-house, and that the persons found in the room, &c., where such tables, &c., shall have been found, were playing *therein*, although no play was actually going on in the presence of the constable, &c., entering the same under the warrant, or his companions." The very point now raised was left unsettled by Sir A. STEPHEN in his judgment in the case cited in the introduction to Nichols' Justice, and we have been unable to find any authority, either here or in England, that being in a gaming-house is an offence punishable by summary conviction. The case cited by Mr. STEPHEN, *Reg. v. Scotton*, 5 Q. B., 493, is an instance of a deposition on oath being a condition precedent to the initiation of proceedings in respect of certain offences punishable under the Game Acts. The 10th section, relied on by Mr. BUTLER, only relates to the form of proceeding before the Magistrates, like the similar enactment in Sir John Jervis's Act.

We are of opinion, therefore, that the prohibition must go, but without costs. The same judgment will be given in the other cases, the proceedings in all of which are open to this objection.

Rule absolute, without costs.

[The case referred to in this judgment is *R. v. Butterworth*, p. 541.—W. H. W.]

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*Impounding Act.*—4 W. IV., No. 3.—*Samuel v. Bury*, March 3, 1853.

This was a conviction under the Impounding Act, 4 W. IV., No. 3, s. 10. The information alleged that for the previous six months Bury, poundkeeper at Concord, had not erected and maintained in the said pound a table of his lawful fees and charges. At the hearing of the case, the defence was rested on several legal objections, which were overruled, and the defendant convicted. The application for prohibition was based on several objections, one of which was, that there was no legal proof of the lawful erection of a pound as required by the 3rd sec. of the Act.

His HONOR was of opinion that this objection was good, inasmuch as the production of the *Gazette*, as legal proof of the erection of the pound, was the mode adopted by the Act; otherwise proof of real use would have been sufficient. But this point he would refer to the full Court, were he not convinced of the undoubted soundness of certain other objections; and he would therefore order the prohibition in this case to issue, and the amount and costs awarded against the defendant to be re-paid.

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*Impounding Act.*—Justices.—*Macdonald v. Loder & others*, April 25, 1857. (*Mandamus*).

A rule *nisi* for a prohibition to set aside a conviction under the last

Impounding Act. In the beginning of 1856, Macdonald impounded 115 head of cattle belonging to one White, imposing upon them a charge for damages of 3d. per head, the lowest damages authorized by the scale drawn up by the Justices. But he also laid upon them a charge of 4s. 9d. per head for driving. White demurred to this, and appealed, giving security for payment in the event of failure; but, instead of taking the cattle away, as he might have done, suffered them to remain in the pound. Macdonald was accordingly summoned before the Local Bench for *excessive damages*, though the damages had been placed at the lowest figure, and the excess, if any, was in the charge for driving. The Magistrate, however, allowed for both damages and driving together 1s. per head, and decreed against Macdonald for the residue of his claim, directing him also to pay the costs of the Court, and to give White a guinea a-day for four days' attendance on the case; but, the cattle having been left in the pound, White was compelled to pay £171 for their maintenance. White had subsequently obtained a rule *nisi* for a *mandamus*, calling on the Magistrates to adjudicate on his claim against Macdonald for this £171, and the order was made absolute without notice to Macdonald. In obedience to the writ, the Justices had entered on the inquiry, and had decided that Macdonald should pay this amount and costs. The proceedings under this adjudication were now sought to be stayed by prohibition. The illegality upon general principles was scarcely contested, and the only material question was whether, having been had in obedience to a writ of *mandamus*, they could be re-opened in the present mode.

The Court made the rule absolute, but without costs.

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*Justices.—13 Vic., No. 8.—Reg. v. Marrington.*

In this case, which was a prosecution at the Court of Quarter Sessions for a nuisance, sundry questions were submitted to us by the Chairman, by a special case under 13 Vic., No. 8.

The principal point was, whether the defendant was properly sentenced by two Magistrates, of whom one was not present before the delivery of the verdict; or whether he was properly tried. Inasmuch as one of the only two Magistrates who were present at the first portion of the trial, was not present either at the verdict or at the latter portion of the trial, it appears to us that the trial and sentence are thereby vitiated. . . .

The Statute clearly confers jurisdiction on two Magistrates only; and it seems to us as unreasonable to hold that a prisoner is lawfully under trial, because two are present at the verdict, although not the same two that were present at any former portion of the case,—or because two are present on the second day of the trial who were not present on the first day of the same trial,—as it would be to hold that one Judge of this Court trying a man for murder, might abandon his post on the second day, or for the latter half of one day, to a colleague, who should eventually be succeeded by a third, by whom, in the absence of the other, the case should be summed up and the prisoner condemned. . . .

There will, therefore, be a direction issued to the Court in this case to vacate the judgment given; and the fine inflicted, if paid, must, of course, be returned.

*Justices.—Hargraves v. Harrison and another, March 2nd, 1858.*  
(*Mandamus*).

This was an application to compel the re-opening and hearing by certain Magistrates of a writ which they had dismissed, on the ground that the Attorney of the then defendant had brought to their knowledge the fact of an action having been commenced in the Supreme Court in reference to the same subject matter. In that action, however, the then defendant was plaintiff.

The Court made the rule absolute. The suit before the Supreme Court was not to be regarded as identical with the suit before the Court below, but as a cross action between the same parties. Consequently, the Court below had jurisdiction, and was bound to exercise it.

*Justices.—Snowden v. The Carcoar Bench, August 24, 1858.*

A motion to make absolute a rule *nisi* calling upon certain Magistrates to show cause why they should not be prohibited from proceeding against the applicant, whom they had found guilty of turkey-stealing, though the Crown Prosecutor had refused to place him on trial under a former committal for that offence.

For the Magistrates, the case was objected to being proceeded with, upon the ground of the prosecutor in the Court below not having been called upon to show cause. The Court having sustained this objection, an amendment of the rule was applied for.

Their HONORS held, however, that they had no power to grant this application, the addition of a new party not being an "amendment," but a fundamental change. They consequently discharged the rule, but, under the circumstances, without costs.

*Justices.—Ex Parte Barr, December 20, 1858. (Mandamus).*

An application by rule *nisi* for a *mandamus* to compel the Sydney Police Magistrate to adjudicate upon a complaint for forcible entry, arising from the disputed ownership of a piece of land, with a hut, &c., at Balmain. There had been forcible entries on both sides. The defendant had once before been committed for trial at the Quarter Sessions for making such entry, but the Crown Prosecutor held that there was no case against him. The charge was afterwards partially heard at the Police Office, when the complainant's Attorney, in reply to a question from the Bench, declared he had witnesses, who, besides proving complainant's title, would make out a case similar to that on which defendant had been before committed. The Magistrate refused to hear this evidence, adopting the opinion of the Crown Prosecutor, and dismissed the case. The principal question was, whether the Magistrate was justified in pronouncing a decision without first hearing the evidence tendered.

The Court discharged the rule with costs. The Magistrate was not bound to hear evidence when its nature had been stated, and it was clear to his mind—exercising, as he did, the powers both of Judge and jury—that the case would be carried no further by it. He had a right, therefore, to dismiss the case upon this ground, and, if such decision was wrong, the prosecutor must come to the Court and ask for a criminal information

against the defendant. There was in this mode a virtual power of appeal against the decisions of Magistrates, when such were thought erroneous. The Magistrate was not justified in acting upon the opinion of the Crown Prosecutor, or of any other person, unless by adopting it as his own.

(See *R. v. Blanchard*, 13 Q. B., 318; *R. v. Bridgman*, 15 L. J. M. C., 44).

STEPHEN, C. J.: The law is clear that a *mandamus* cannot issue to compel a Magistrate to decide a matter before him correctly, but merely to compel a decision. Where the same evidence is offered as was offered before the Justice on a former case, and he considers that it would not be sufficient to prove the offence, the Magistrate is justified in not wasting the public time, and, such evidence being tendered, in refusing to hear it. There is no appeal from the decision of Magistrates. A *mandamus* implies that the Magistrate has declined to proceed. Forcible entry means some extreme force. The *mandamus* will not lie.

DICKINSON, J.: I am of the same opinion. *R. v. Hughes*, 3 Ad. and E., is an authority that a *mandamus* will issue to compel adjudication, but not to decide properly.

THERBY, J.: In *R. v. Stapelton*, 21 L. J. Q. B., 8, a refusal to adjudicate (which appeared to amount to a dismissal of the plaint, being an interpleader summons) was subject for a *mandamus*.

*Justices.—The Queen v. Sinclair*, December 15, 1857. (*Mandamus*).

This was a motion for a *mandamus* directing the Police Magistrate to show cause why he should not hear and determine an information filed against the defendant by one Quirk, for having in his possession certain goods, part of the cargo of the "Catherine Adamson," wrecked on the North Head, for the possession of which he could not satisfactorily account. The defendant had been first committed under Sir R. Peel's Larceny Act for the offence now charged against him, but the Attorney for the prosecution, having determined to indict him for stealing these goods, had withdrawn the first charge. Of the stealing, however, he had been acquitted at the Quarter Sessions. Quirk now sought to revive the first charge by a new information before the Police Magistrate, but the latter refused to entertain it, upon the ground that defendant had already been committed and properly discharged under the same accusation.

The Court made the rule absolute. The defendant had not been even tried upon this offence, although he had been acquitted of the higher charge of stealing. There was no reason whatever, therefore, why the charge should not be revived against him. And the offence being one against the public, an information could be presented by anyone.

*Justices.—In Re Nathan v. Marks*, 1851.

The conviction was on the 23rd of July. Repeated applications were made by the defendant for a copy of the conviction, in order that he might apply for a prohibition. The conviction was drawn on the 2nd of October, and a few days after a copy of it was forwarded to defendant's Attorney,

under 14 Vic., No. 43, s. 12. The application for the prohibition ought to have been made within thirty days after the conviction. On an application to the Court for a rule *nisi*, the CHIEF JUSTICE said that the Court must refuse the rule, as the Act under which the application was made restricted the interference of the Court to within thirty days after conviction. The Magistrates had acted most improperly in not furnishing to the defendant the copy of the conviction when applied for, or within a reasonable time after. The defendant was not without a remedy, if he thought right to enforce it.

*Justices.—Ex Parte Lannoy, March 20, 1860.*

HIS HONOR Mr. Justice WISE gave judgment in this case as follows:—

The Justices in this case have mistaken the section applicable to the facts, because it is the 51st, and not the 48th, which relates to ships putting back in a damaged state.

The evidence adduced before the Justices sufficiently establishes that subsistence money was refused by M. Lannoy, and, default having been thereby made in the requirements of that section, the applicant was entitled to a return of the passage-money before the lapse of the six weeks, which is the time limited for the performance of another requirement of the section.

I am by no means clear that the refusal to provide a ship was not also established, but the Statute gives the return on default of any of the requirements.

The order, however, is for the payment of £2 5s., subsistence money, as well as the return of the passage-money, and this does not appear to me to be authorized by that section.

The order, therefore, is bad; but does it appear to be a mistake or error amendable under the 13th section of the Justices Act of 1850?

The object of that enactment is, in my opinion, to allow an amendment wherever the truth and merits of the question, established by the actual proceedings before the Justices, show that the omission or mistake in the order would have been avoided if they had correctly understood the application of the law to the facts, provided the mistake did not affect the exercise of any discretionary power.

In this case the award of the return of the passage-money was not the award of any arbitrary sum, dependent on the discretion of the Justices, but followed as a matter of right upon proof of the requisite facts. An error in the recital under which they made the order is, therefore, I think, immaterial.

I am of opinion that the order itself is also amendable.

The bad part, that is, the order for subsistence money, is separable from the good part, and, according to a long recognized principle of law, the order may be sustained as to the good part. (See *Reg. v. Maulden, S. Barn. and Cress.*, 78; *Reg. v. Robinson*, 17 *Queen's Bench*, 468; *Ex parte Coley*, 4 *N. S. Cases*, 507).

The order will, therefore, be amended, and the rule *nisi* for a prohibition refused, but without costs, because it is in part successful.

Rule refused.

*Justices.—January 23, 1860. (Prohibition).*

Before Sir ALFRED STEPHEN, C.J.

This was an application for a prohibition on behalf of one W. Sullivan, to restrain Messrs. Warburton and Kettle, Esquires, two of Her Majesty's Justices of the Peace, and Mary O'Sullivan, from further prosecuting an order. Several grounds were stated, but only one ground was gone into, namely, that Mr. Kettle was not one of the Justices sitting in the case at the Central Police Court, and that other Justices were associated with Mr. George Warburton in making the said order, namely, Messrs. Armitage and McLean. Mr. Kettle appeared in person, and admitted that he was not one of the presiding Justices in the case, but had been on the Bench that day in a former case, and the Clerk at the Central Police Office having informed him (Mr. Kettle) that he was one of the Justices making the order, asked him to sign the depositions and the order, which he did. The Chief Justice, without calling on Mr. Cory for a reply, granted the prohibition on that ground alone, but without costs.

*Malicious Injuries.—In Re Dutton, February 26, 1856.*

This was an application for a prohibition to restrain proceedings under a summary conviction of the appellant for wilfully destroying a fence, under Sir R. Peel's Malicious Injuries Act, sec. 23. The appellant and others had for fourteen years made use of a road through the land of the prosecutor in the Court below, the only one from appellant's farm to Maitland. The appellant's use of it was under the authority of a written permission, without any limitation to time, which, in consequence of a dispute between the parties, (appellant having impounded some of the cattle of the other), was withdrawn, and, instead of a "slip panel," as heretofore, a fence placed across the road. Appellant sought to pass with drays, but was told that the road had been stopped against all parties, and against him especially for the reason stated. Therefore, on the strength of his former permission for an indefinite period, and of long usage of the road, the appellant cut the fence down. For this he was fined by the Singleton Bench 5s., with damages and costs, or to be imprisoned for forty-eight hours. Their HONORS held that the word "maliciously" in this clause must mean "wantonly," "recklessly," as there could be no malice in the ordinary sense against a chattel. The question therefore was, whether the appellant had acted wantonly and recklessly, or merely in the assertion of a right.

The CHIEF JUSTICE was of opinion that the prohibition ought to go. Looking at the facts, that this was the only road to Maitland from appellant's place, and had been used as such for many years,—that he had had a written permission to use it without any limit as to time,—and that the refusal to continue this permission was only given upon the ground that there had been a quarrel about impounding cattle, the reasonable conclusion was, that appellant believed he was asserting a right.

Mr. JUSTICE DICKINSON was of a contrary opinion. The appellant having used this road in virtue of a written permission only, could not claim to use it as a matter of right. He had had notice that this permission was withdrawn, and that against him especially the fence was to



be considered as a barrier, because of his having impounded the cattle of the owner of the land through which the road passed. In cutting down the fence after this intimation, the appellant must be held to have acted unlawfully and maliciously; consequently the rule ought to be discharged.

Mr. Justice THERRY coincided with the latter opinion, and the rule was consequently discharged.

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*Malicious Injuries.—Ex Parte Reedy, December 16, 1856.*

This was an application for a writ of prohibition to restrain the Wollongong Magistrates from enforcing a conviction for malicious destruction of property, viz., the tearing down of a large extent of fence. The application was founded upon affidavits that the Magistrates refused to hear witnesses in support of the defendant's claim to the land upon which the fence was erected. On the other side, it was contended that the extent of the trespass showed it was done maliciously, and the evidence proposed to be given was then immaterial. The prosecutor, by his Attorney, (it was stated), was a party to the rejection of the evidence, and should pay costs.

Their HONORS granted the prohibition with costs against the prosecutor.

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*Mandamus*—See cases given under "Justices," *ante*.

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*Masters and Servants' Act.—Ex Parte Stenhouse, January, 1859.*

Mr. Justice THERRY delivered judgment as follows:—

This is a case of considerable importance, as it regards the contract of service entered into between immigrants and others who become servants, and their employers. The matter comes before me in the shape of an application under the Justices' Acts of 1850 and 1853, for a prohibition to certain Magistrates, who have adjudicated in the respondent Richardson's favor, to restrain them from further proceeding in respect of an order made by them against the appellant, on the said Emma Richardson's complaint of a breach by him of the Masters and Servants' Act, 20 Vic., No. 28, in unlawfully discharging her from his service in violation of a written agreement between them, under which she claimed three months' wages. She had been paid £2 4s. 6d., the amount due for the period she actually served, and now claimed the difference between that sum and £5, which would be due to her, if she had remained in the service three months. The application rested on several grounds. Of these an important and novel one was whether, under the Masters and Servants' Act, Justices have jurisdiction over a servant's complaint, not for wages, but for a *wrongful dismissal*. It is not, however, necessary to decide that point in the present case; for, admitting the jurisdiction, it is plain on the face of the evidence that the decision is wrong. The depositions disclose a case in which the woman was discharged for grossly impertinent and outrageous conduct; and yet the Magistrates—I speak, of course, with due deference to their decision—have awarded full wages for the whole period of her engagement; not only for the six weeks she acted as servant, but for the further six weeks she did not serve, and for which period her gross misconduct manifested her unworthiness to be retained in the service. He (Mr. Justice THERRY)

was aware that several sections, especially the fifth, gave a large discretion in dealing with contracts of this kind. The Justices were empowered to adjudicate on questions of wages, and "to make an order for the payment of any wages or damages which to such Justices shall appear reasonable and just"; but surely this could only mean and apply to cases where there is some evidence to support the reasonableness and justice of the decision, and cannot comprehend a case where the evidence establishes that it is inconsistent with reason and justice that an order for such payment should be made. Now, what are the facts apparent here? They are, that this servant, Emma Richardson, (without any apparent provocation by Mr. Underwood, whom I regard in no higher position than that of a visitor or inmate, domesticated in Mr. Stenhouse's family, though he states his belief that he had authority in the house as master, in the absence of Mr. Stenhouse), came up to him and said, "You are a rascal or scoundrel," at the same time putting her face up to him, and making horrible grimaces. Underwood swore that he had not spoken to her when she used these expressions, and that she appeared to him delirious. On being threatened with a constable for such violent language, she said, "Go, and don't be long; I'll put any — constable down the steps,—you and him." She further added, on no constable being found, "Will you fight me, you old grey-headed scoundrel." On this conduct being reported to Mr. Stenhouse, whose place of business is in Sydney, but whose place of residence is at Balmain, he sent his servant or agent, Mr. Price, who paid her the wages due up to that date, and discharged her. Some rough and very uncivil language is deposed to by Emma Richardson, to have been used by Price on the occasion, but Price swears quite as strongly in denial of having used it, and Mrs. Dunbar (Richardson's sister), who was present, does not support her statement in this respect; but Mrs. Dunbar does support her statement that she did not consent to take the money she then received, as payment in full of her claim for wages. On this point there is, nevertheless, some contradiction; for Ostler, a carpenter, who was present, states that she said, "If they pay me what's coming to me, I'm willing to leave." Ostler further supports Underwood's statement as to the conduct of Emma Richardson and the state of her mind: he says, "She appeared to be in a passion, and out of her mind, she was crying so." Now, it may not be easy to decide whether from mental infirmity or ill-governed passion such conduct proceeded, but the true question was, whether it was reasonable to expect that Mr. Stenhouse could fairly be expected or required to retain this woman in his service? It was the plain duty of the servant to regard an inmate of the household, if not with the respect due to her master, at least with common decency and decorum, and not to act in such a manner as to amount to an utter violation of all propriety, and leave her master little reason to hope that, with such a servant in his house, he could expect peace and due subordination in his family.

There was a reference in the depositions to a former complaint being preferred against this servant, but, as its details are not given, I pronounce no opinion upon it. But from the details that are given in the present proceeding, facts are disclosed which constitute gross misconduct, and thereby justify the dismissal of the servant. It is not every slight act of misconduct that would authorize the dismissal of a servant under contract

to serve three months, or any agreed-upon period. An occasional neglect of orders, a sulkiness of temper occasionally, or occasional disobedience in matters of trifling moment—neglect, for instance, to answer the bell, and various other acts that might be designated as venial negligence,—would not relieve a master from liability to fulfil his engagements; but, on the other hand, gross misconduct, of which the present case presents a flagrant instance, immoral conduct, frequent absence, and sleeping out without leave, were instances which had been held to warrant a dismissal of the servant, and a dissolution of the contract by the master. Indeed, if it were otherwise, the hardship upon masters would be grievously severe; for, as all immigrants especially are known to be bound under nearly similar contracts to the present, it would be tantamount to holding these absolutely indissoluble, to hold that they may not be dissolved by such misconduct as has been here evinced. A servant, in such a state of things, would have only to repeat the like conduct and use the like language, and, on being dismissed at the end of a week, he or she might claim three months' wages, which she would have earned, not by her faithful services, but by insubordination and insolence.

I may add that, though I entertain a strong reluctance to interfere with the judgment of Magistrates at any time, especially in dealing with judgments upon facts rather than questions of law, yet, being strongly of opinion that the present judgment cannot be sustained by the evidence disclosed in the depositions, and being fortified in that opinion by the concurrence of the Chief Justice, with whom, in deference to the Magistrates, I have deemed it right to confer, the application for a prohibition to stay further proceedings on the conviction in this instance must be granted, but without costs.

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*Masters and Servants' Act.*—20 Vic., No. 28.—*In Re Starr*, April 27, 1859.

This was a motion for prohibition of an adjudication under the *Masters and Servants' Act*, 20 Vic., No. 28.

It appeared that the Justices had adjourned the case for an hour, the defendant not appearing, after which they determined to hear it *ex parte*, and proceeded to take evidence as to the service of notice. Meanwhile the defendant appeared in Court and claimed to be heard, which the Justices refused, as, having commenced to hear the case *ex parte*, they decided to continue it in that form.

Their HONORS, with regard to the objection that costs could not be given when notice of an intention to apply for them was not given in the rule, held that they had a right to award costs in such cases. The Justices' Act empowered them, when giving their decision, to make such further order as to them should seem fit. The principle on which the Court acted was, not to give costs against Justices, unless they showed by their conduct either corruption or gross ignorance. In this case the mistake into which they had fallen was on the very threshold of justice, and such a violation of the maxim *audi alteram partem*, and so dangerous in its tendency, that the Court would grant costs.

The rule was therefore made absolute with costs.

*Master and Servant, Justices no Jurisdiction.—Evans v. Masters, April, 1856.*

The applicant had done some work by contract, for which he had been paid, the work having been first surveyed. Subsequently, however, it was urged that this work was done badly, and, proceedings having been taken against applicant on this ground, the Justices sentenced him to imprisonment, of which he had already suffered seven weeks. No cause was shown, but, as it appeared, the Magistrates had had notice.

Their HONORS set aside the conviction, and awarded costs against the Magistrates.

*Masters and Servants' Act,—9 Vic., No. 27.—Ex Parte Evennett, January 23, 1854.*

The following judgment was delivered in Chambers by the CHIEF JUSTICE.

This is the case of a *Habeas Corpus*, issued at the instance of Frederick Evennett, who has been convicted and committed to prison under section 2 of the Masters and Servants' Act, (9 Vic., No. 27, in *Call.*, 1572), for absenting himself from the service of Andrew Gribben; and the question raised is, whether Evennett was a *servant* within the meaning of the Act, it being agreed that, if he was not, as the Magistrates had no jurisdiction, the said Evennett should be discharged.

It is necessary to mention this in the outset, because it is (to say the least) doubtful whether defendant's remedy in this case was by *Habeas Corpus*, or, in other words, whether he should not proceed under the Justices' Act of 1850, by *prohibition*. The former writ is inefficacious (ordinarily, at least), except in cases of defective commitments. If the warrant itself was in terms sufficient, the party had at Common Law no remedy. On the other hand, if its terms or form were defective, he was in general entitled to his discharge, however just and correct the conviction may have been. But the writ of prohibition, by the Act of 1850, sec. 12, is made applicable to erroneous convictions, without regard to the form of commitment; and, whether the error be one of fact or of law, and if the party convicted be already in gaol, or have already paid his fine, the Act gives the Court or Judge a power (as we have distinctly held) to discharge him, or direct restitution as incidental to the prohibition. In the present case, however, the *commitment* is defective; for it omits to allege either that Evennett had entered in his service, (which is essential, if the servant's contract be not in writing), or, on the other hand, that the contract in fact *was* in writing. This, indeed, is a defect which I should certainly amend under sec. 9 of the Act, if I had the power; but the enactment very properly gives that power only in cases where the conviction itself was warranted; so that I have to consider, as on a motion for a prohibition, the propriety of the conviction.

Now, that depends mainly on the question already stated, namely, whether the person convicted was a *servant* within the meaning of the Act first mentioned. The 21st section declares it to embrace, not domestic servants only, but all agricultural and *other* labourers and workmen, shepherds, stockmen, and artisans, domestic and *other* servants. The description, therefore, is very comprehensive. Nevertheless, according to all the

decided cases under the Masters and Servants' Acts in England, the words will not include every class of individuals who are in employment at wages. A singer hired by the week, and receiving board, for instance, would certainly not be so included; nor, I apprehend, (but for the express enactment in sec. 8 of this Act), would shingle-splitters, shearers, or fencers. A shopman, an assistant in a trade (not actually an artificer or artisan engaged in manual labour), and other instances, might be added as falling within the same category. In this case the person is a "veterinary surgeon and working farrier." The contract between Evennett and the Messrs. Gribben, which is in writing, so describes him, and his engagement is as "an assistant in the veterinary department; also, to the working of the farriery department." For this Evennett is to receive so much per week, and, for working over-hours, (none, however, being actually specified), half the profits of that work.

I am of opinion (and, having consulted the other Judges, they agree with me) that such a contract did *not* make Evennett a servant within the meaning of the Statute. He is, no doubt, described as a "working farrier," and he is to be an assistant to the working of the farriery department as well as in the veterinary branch! but a farrier is not, properly speaking, a mere shoer of horses, and Evennett is hired as an *assistant*, not a mere labourer or journeyman, in both the farriery and veterinary business. A person of that description, so hired, is not, I think, a servant within the meaning of the 9 Vic., No. 27, and therefore could not have sued for wages, nor was amenable to summary punishment, under any section of that Act. The defendant will, consequently, be discharged.

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*Masters and Servants' Act,—Harbouring.—9 Vic., No. 27.—Ex Parte Harper v. Herbert and others, December 27, 1854.*

A rule *nisi* for a prohibition upon a conviction under the Masters and Servants' Act.

The applicant was a publican; a neighbouring sheepowner had seen two of his shearers at his house, and instituted proceedings against him, under sec. 16, for receiving and harbouring his hired servants. The Bench awarded a penalty of £2 and costs. The Court held that the prohibition must go, as this was not "a receiving and harbouring" within the meaning of the Act.

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*Master and Servant,—Wages.—9 Vic., No. 17.—In Re Buchanan.*

A writ of prohibition to restrain proceedings on a conviction for non-payment of wages. The evidence of the complainant before the Justices showed that he entered into the service of the applicant as a general servant, at no fixed sum or wages, according to 9 Vic., No. 27, s. 9. The Justices convicted the applicant, and ordered him to pay the complainant the sum of £8 16s. 4d., with 5s. 2d. costs, within 21 days, or to be imprisoned for one month. The applicant's Attorney obtained a copy of the proceedings with a view to the present application for a writ of prohibition. When the matter came before his Honor Mr. Justice THERRY, it was argued that the Justices had no jurisdiction under the circumstances, and that the complainant's remedy was an action on the *quantum meruit* in the

Court of Requests. For the complainant, it was argued that, under the 25th section of the Act, the applicant's remedy was not by prohibition, but by appeal to the Quarter Sessions. In reply, the applicant's Attorney quoted 17 Vic., No. 39, s. 4, which, he contended, applied to all orders and convictions before Justices of the Peace.—His Honor ruled that the prohibition must issue, and that complainant's only remedy under the circumstances was an action in the Court of Requests.

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*Masters and Servants' Act.*—*Nixon v. Forbes*, July 13, 1858.

An application for a prohibition to restrain proceedings under an award for the payment of a servant's wages, on the ground that the Magistrates had, under the circumstances of the case, no jurisdiction. The applicant denied that he had agreed to do more than give the claimant provisions and a house to live in for his labour. The Magistrates had made an order for only about half-a-day's wages less than the amount claimed, allowing nothing for house or provisions. Nixon had objected that the case having been already previously heard and dismissed, no order being made, there was no jurisdiction. This having been overruled, he applied for a postponement to summon witnesses, but this was refused. The question of jurisdiction was now re-opened and discussed, as well as the mode in which the second inquiry was conducted, and the propriety of the refusal to grant the application for a postponement. It appeared that, instead of beginning *de novo*, the Magistrates had simply re-sworn the witnesses, and questioned them as to the truth of their former depositions, after these had been read; but Nixon had himself cross-examined these witnesses.

The Court held that the prohibition must be refused, but, under the circumstances, without costs. Making no order was equivalent to a dismissal, and must be so regarded. But the complainant was not thereby necessarily stopped from resuming his complaint before other Magistrates. The Justices had the right of adjudicating "without prejudice," or of adjudicating finally. The Statute gave them power to grant a certificate which would prevent the case from being re-opened. No such certificate had been granted here, and it did not appear that it had even been applied for. The course taken by the Justices on the second hearing was erroneous. They ought to have examined all the witnesses *de novo*,—to have called upon the complainant to prove his case in the ordinary mode; but, as no objection had been made by Nixon to this course, he must be taken to have consented. The counter-demand for house-rent and provisions was in the nature of set-off, and it was questionable whether the Magistrates could have allowed them. Nixon had his remedy by suit in the Court of Requests. It would, perhaps, have been well if the Magistrates had granted the postponement applied for, but they had full power to refuse it, and there was no allegation that Nixon had been injured by the refusal. It was stated that the mode in which the evidence was taken at the second hearing was pursued by the Counsel of the parties.

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*Masters and Servants' Act.*—*Ex parte Tighe*, August 12, 1858.

Judgment by Sir A. STEPHEN.

This was an application for a prohibition against an order by two Jus-

tices, under the Masters and Servants' Act of 1857, for payment of wages as a labourer to one Hayes.

1. This matter has stood over for an opportunity either of argument before the three Judges, the points involved being of importance and difficulty, or for consultation on those points, after hearing the Attorneys for the parties; the case having come on originally before Mr. Justice TERRY, and afterwards (but without argument) before myself.

2. The questions appear to me to resolve themselves finally into this,—whether the Justices had jurisdiction to make the order appealed against? The complainant described himself in the information as a “daily” labourer,—not as one hired for any definite period; but in his evidence he says that he was “hired at 8s. a day—to be paid every fortnight.” The defendant's Attorney sought to establish the point that this was not a hiring for any definite period, and that such a hiring was essential. The defendant himself, however, having admitted that he owed a certain balance, and only objecting to a small excess over that amount, which excess the Justices disallowed, their Worships thought all question as to the period of hiring immaterial; and they awarded payment of the admitted balance accordingly.

3. In so holding, the Justices appear to me to have been in error, because the objection by Tighe's Attorney went to the question of *jurisdiction*. But no consent by a defendant can confer jurisdiction on a tribunal, if it have not jurisdiction by law. The objection ought, therefore, to have been considered and distinctly decided. Nevertheless, it appears to me that, if the Justices actually *had* jurisdiction in the case, their order may stand, as, by necessary implication, asserting that jurisdiction.

4. It was insisted that they had not the jurisdiction in question, because the wages mentioned in s. 5 (under which the payment of wages may be ordered by Justices in certain cases) must be due upon *some contract of the kinds contemplated in sections 2 and 3*. Now, those sections include only contracts made for a *definite time, or for specified work*. The words in the English Statutes, “contracting to serve for any time, or in any other manner,” are held by a host of authorities to apply exclusively to contracts for some *definite time*, (or undefined time, determinable on notice), notwithstanding that the concluding words, “or in any other manner,” would appear to indicate a contrary conclusion.

5. But I see no restriction of this kind in sec. 5, which in terms includes every case of wages due to “any” servant, not exceeding fifty pounds—that is, to any person whose entire time shall have been engaged, as a servant's is, whether a day labourer or not, and whether (it seems to me) hired definitely or indefinitely, as to either time or rate of payment. The 5th section appears to embrace all contracts, expressed or implied, where wages have been *earned*, and are payable. The 2nd and 3rd sections, on the contrary, applying to breaches of contract by the servant, include only cases of hiring for some period specific and defined, or to do some specific and defined work.

6. There having been in this case, therefore, wages so payable to a servant, (and at a definite rate, too), I am of opinion that the Justices had jurisdiction over it. It appears to me further that, if a defined and stated period of engagement, or for a specific quantity of work, was necessary to

confer that jurisdiction, the evidence shows such a period ; i. e., an engagement, at a daily rate, from fortnight to fortnight—renewable at the will of both parties at the end of each such term of service. So that, under the enactment giving the remedy by prohibition, I might permit, if necessary, the conviction to be amended by stating the period of service.

7. The rule for the prohibition is discharged, but, under the circumstances, without costs.

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*Perjury.—The Queen v. Scott, May 4, 1857.*

This was a special case reserved from the Criminal Sittings. The prisoner was convicted of perjury in giving evidence at the Petty Sessions, but there was no formal averment in the information either that the false evidence was material to the issue, or that the persons there named as sitting in Petty Sessions had power to administer an oath. It was the absence of those two averments which was relied on by prisoner's Counsel. The Court sustained the conviction. It would have been better to have asserted an averment that the evidence was a material one ; but this was not an essentially necessary one, because the evidence itself was set out, and its materiality was self-evident. As to the second point, the Court had judicial knowledge of the fact that a Court of Petty Sessions hearing such a charge as this had power to administer an oath, and, consequently, an averment of this power is unnecessary.

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*Police.—2 Vic., No. 2, s. 15.—In Howard v. Street, July, 1852.*

Their HONORS held that a conviction under s. 15 was bad under the following circumstances:—The Act 2 Vic., No. 2, s. 45, provided for the laying down of carriage-ways and foot-ways, which, when thus laid down, should be deemed carriage-ways and foot-ways within its meaning. The 15th section made it an offence to place obstructions of the nature alluded to upon any such carriage-way or foot-way. Now, until these alignments were made, the street or place was not, strictly speaking, a street within the meaning and for the purposes of this section. The Legislature having made a distinction in terms between the carriage-way and foot-way, the Magistrates were bound to say whether the obstruction was upon one or the other, or upon both. This, of course, could not be determined until divisions of the street were defined. And again, in the absence of the alignment, it did not follow but that the site of the obstruction or alleged obstruction might, as already pointed out, be really external to the street, as defined by the Statute, and by usage and in appearance a part of it.

(But see now 19 Vic., No. 10, and (Note x), 337).

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*Police.—In Ex Parte Keary.—Shadforth's Judgments for 1849, p. 49.*

It was held by the Supreme Court at Victoria that, upon a party being committed to gaol for not paying a fine, under the 2 Vic., No. 2, sec. 60, (the Lands Police Act), it should appear on the warrant that there has been a default in payment, or an ineffectual distress to obtain it.

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*Police.—In Johnson v. Dowling, December, 1852.*

The Court held that a cart, however heavy, could not be held light



within the meaning of the Act 2 Vic., No. 2, s. 39, simply because on any particular occasion it might be found with a pair of reins, and with but one horse attached to it.

*Publicans (Licensed).—In Re Frost, June 16, 1859.*

Before the CHIEF JUSTICE and Mr. JUSTICE DICKINSON.

This was an application, by rule *nisi*, for a prohibition to stay all proceedings under a conviction of the applicant for "sly grog selling," by the Dubbo Bench, upon the ground that the same was against evidence, that improper evidence had been admitted by the Justices, and that an excessive punishment had been awarded. The case was partially argued on a previous day, and the argument was now resumed and concluded.

Mr. FAUCETT appeared in support of the rule, and Mr. WISE in support of the conviction.

Frost was convicted by Messrs. CORNISH and CHRISTIE, Justices of the Peace at Dubbo, under the 67th section of 13 Vic., No. 9, for an unlicensed carrying about of liquor for the purpose of sale. The prosecution was originated by the Chief Constable of Dubbo, who, with one of the ordinary constables, seized some thirty-two gallons of rum and a cask of beer in the possession of Frost. The latter declared at the time of the seizure that he was a mere carrier of the spirits and beer for others, who had ordered them,—not as a common carrier, indeed, but as a servant. When he was brought before Mr. CORNISH his defence was the same, and he produced the evidence of a storekeeper's assistant, (the storekeeper himself, Mr. Serisier, being absent), to show that the cask of beer and thirty gallons of rum had been supplied to the order of one Brian Eagan, a squatter. He stated that the other two gallons, purchased from another storekeeper, Mr. Antony, were also to be delivered to order. The Clerk of the Bench suggested that this part of the then defendant's loading was all right, as Mr. Antony was in attendance to give evidence, and the Magistrates acquiesced in that suggestion. He, therefore, rejected that part of the case without requiring evidence at all. But as to the liquors said to have been purchased from Mr. Serisier, he declared, notwithstanding the production of the order, purporting to be that of Eagan, by Serisier's assistant, he would take nothing less than Mr. Eagan's oath. The case having stood over for this purpose, and proceedings under the Act having been formally initiated, Mr. Eagan was examined. He swore that Frost was his stock-keeper, and that the order was his. He was himself, he said, a teetotaler, but he supplied grog to his men "as they required it"; and he also needed both spirits and beer for the entertainment of his relatives and friends. He further stated that he required such supplies for an overland journey to Port Phillip. There was no evidence in direct contradiction of this, or of the production of an order from the store whence the liquor had been supplied, but a good deal of hearsay evidence was admitted as to the former conduct of Frost. The Chief Constable spoke of having "received information" that Frost had supplied grog to many people, and, among others, to two whose deaths had ensued from an excessive use of the liquor thus furnished. Other evidence of the same character was given, and a "belief" was expressed that Frost was on his way to sell this liquor at certain races which were shortly

to be held. The Justices convicted Frost, and sentenced him to pay a fine of £50, or to be imprisoned for three months in Bathurst gaol. This sentence of imprisonment was in excess of the power given to the Justices, but the fine had been paid under protest, and it was admitted that, as Frost had not been imprisoned, the excess might be expunged by their HONORS, and the conviction, if otherwise justifiable, be sustained. Copies of the depositions were subsequently applied for, but refused, and were only eventually obtained on the application of an Attorney.

An affidavit had been made by Mr. CORNISH to the effect that he had disbelieved the evidence adduced by the applicant, and it was contended that the evidence and circumstances of the case, taking them as a whole, were sufficient to make out an irresistible case of suspicion—such a case as would warrant this conviction; in fact, that Frost was clearly a sly grog seller, engaged in his avocation, but with a story and accomplices ready for his defence in case of detection. It was submitted that, if the conviction was set aside, it ought only to be upon condition that no action should be brought against the Magistrates. This was strongly resisted on the other side, and the very hint of such a condition was relied upon as evidentiary of something improper on the part of the Magistrates. It was contended that there was no evidence whatever to sustain this conviction, and that hearsay testimony of no value had been most improperly admitted and relied upon for that purpose.

Their HONORS held that the conviction was unsustainable. The evidence of suspicion was sufficient to justify the seizure of the liquor and the filing of an information under the very stringent clause referred to. That clause cast upon the person in whose possession the liquor was found the *onus* of proving that he was not carrying it for sale. He had sufficiently met this requirement by the evidence which he had produced. As in the first instance the production of the order to Mr. Serisier had been held insufficient, and as he had been then told that nothing short of Eagan's oath would be taken, it was not an unnatural conclusion that he should suppose that this person's evidence on oath would suffice to clear him. The evidence of Eagan was most positive, and there was nothing whatever, so far as the Court could see, to warrant a disbelief of it by the Justices. It had been uncontradicted by either of the three only modes whereby sworn evidence was disprovable—namely, by the direct evidence of other witnesses, by showing that Eagan had made contradictory statements elsewhere, or by calling a reliable witness to show that he (Eagan) was not worthy of belief on his oath. There was no fact whatever properly in evidence before the Justices upon which the Court could see any justification of their disbelief of Eagan's evidence. Any of the facts upon which hearsay evidence had been received might, if proved, have sustained the suspicion of Frost having carried this liquor for sale; but this hearsay evidence was not of any force in contradiction of direct testimony, and should not have been received for such a purpose. The conviction must, therefore, be set aside, and the fine of £50 paid by the applicant must be returned. The cart and liquors, if under the control of the Justices, must also be returned, and, if not under their control, the applicant could recover them by an action of trover.

The Court refused to grant costs either against the Justices or against

the informer, holding that they appeared to have acted *bonâ fide* upon the suspicions which they entertained, and it was incidentally remarked that in all probability the whole of the facts or suspicions influencing the minds of the Justices were not before the Court.

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*Publicans (Licensed)*—13 Vic., No. 29, s. 18.—*Ex parte Copeland*, 1850.

In *ex parte Copeland*, (Shadforth's Judgments, 1850, p. 15), it was decided that under s. 18 of 13 Vic., No. 29, the licensing Justices are at liberty in all cases to grant or refuse a license according to their own discretion. As to their obligation to hear evidence on facts within their own knowledge, the Resident Judge thus expressed himself:—"I need not determine whether the Justices ought or ought not to have evidence on oath given of objections emanating from themselves. Certainly, they have a right to act upon such objections, and many can be imagined which could not very well be made the subject of proof. The object of the 18th sec. was to prevent clandestine information operating to the prejudice of the applicants, and in order to enable them to meet by evidence any objection which might be raised against them. In the present case, it does not appear how the Justices obtained their information; and all I will say on this point is, that though I consider them at perfect liberty to act upon their own knowledge, and upon the information of others when they can rely on it, yet I think it would be more in accordance with the spirit of the Act, when *particular facts*, and not mere matters of opinion, are the ground of their objection, that they should, if possible, require them to be proved before them, or give the applicant an opportunity of denying them."

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*Publicans.*—*Taper v. Bell and another*, May 12, 1853.

Mr. STEPHEN moved to make absolute a rule *nisi*, calling upon two of the Braidwood Magistrates, Messrs. Bell and Moring, to show cause why an injunction should not issue restraining them from proceeding further under a conviction of the applicant, who had been fined £50 for selling spirits without a license. The facts were these: An information was laid against Taper for permitting the sale of spirits without a license, two glasses having been sold by Taper's wife to the informer and another person. The case was partially heard before Mr. Bell and another Magistrate, and it did not appear that there was any proof that Taper had been a consenting or approving party. The case was afterwards twice adjourned by one of these gentlemen on account of the other being absent, notwithstanding the protest of Taper's attorney against the expense and delay thus occasioned. Finally, the two Magistrates differed in opinion. One thought that the case ought to be dismissed, because the breach was that of the wife alone; while the other held that the husband was answerable for the acts of his wife. It was Mr. Bell who held the latter opinion, and Mr. Moring, who was present with him on this occasion, concurring with him, Taper was convicted and sentenced to pay a fine of £50, which he immediately paid. The Attorney applied for copies of the information,

depositions, and conviction. Mr. Moring allowed a copy of the depositions, but would not permit copies to be given of the information and conviction, and prohibited the Clerk of the Bench from furnishing them. There were several grounds of objection, but the case turned wholly upon one,—the absence of any evidence of Taper being a consenting party.

The ATTORNEY-GENERAL contended that, as it was in the province of the Magistrates to determine as a jury the fact of Taper's concurrence or non-concurrence in the act of his wife, they must be taken to have found that fact properly and on sufficient evidence. The penalty, also, having been paid by the applicant, had been handed over to the proper officer and carried to account in the Treasury; it was consequently beyond the control of the Magistrates. They had done with the case, and had no other proceedings to take from which an injunction was needed to restrain them.

Their HONORS, without calling upon Mr. STEPHEN to reply, held that the injunction must go. It was a clear and unquestionable principle of law, that no man could be made responsible, as a crime, for the act of another, unless he was directly implicated with reference to that act. In the present case there was not the slightest evidence of concurrence, either direct or indirect, on the part of the applicant. The fine, wherever the Magistrates got it from, must be returned. This, however, was a case in which it was also imperative on the Bench to give costs against the Magistrates. The country was undoubtedly under great obligations to the gentlemen who then administered justice in the interior without salary, and there was no moral imputation sought to be cast upon the particular Magistrates who had dealt with this case. But where there was a very great mistake in point of law, and this mistake had been attended with great hardship, full justice must be rendered to the party complaining. Such was the case here. There had been the loss of time through repeated postponements, a conviction wholly unsupported by evidence, and a flat refusal to furnish copies of the information and conviction, although the accused was entitled by Act of Parliament to demand them.

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*Publicans.*—13 Vic., No. 29.—*Klensendorffe v. The Liverpool Bench*, June 2, 1853.

This was a rule *nisi* obtained on the application of William V. Klensendorffe, calling upon Messrs. Samuel Moore, Richard Sadler, and John Bosley, Magistrates of Liverpool, and Henry M'Donald, Chief Constable of that district, to show cause why they should not be restrained by injunction from proceeding further under a conviction of the applicant for selling spirits without a license.

The information charged simply a sale of spirits without a license, which rendered the plaintiff liable to the infliction of a penalty of £30; but it appeared incidentally that he had been formerly convicted of a similar offence, and he was thus liable to a penalty of £50. Consequently, although the information did not set out an offence in this aggravated form of a second breach of the law, the Magistrates convicted him of it, and imposed the larger penalty. The proof of a former conviction had been by secondary evidence, but, as its admission was not objected to by the plain-

tiff at the hearing, it was contended that the latter was estopped from urging the objection now. The main question, however, was whether, admitting the decision to be wrong, the Judges had not power to amend it by imposing the lower penalty, inasmuch as there was clear proof of plaintiff having been guilty of sly grog selling, although there was no sufficient evidence of its being a second offence.

The Court held that the prohibition must go. There had been no legal evidence of a former conviction, and, even if there had been, it would not have justified this decision, as the information was only for the minor offence, and the plaintiff was not estopped from taking any objection of this kind, because, having no legal advice, he had not taken it before the Magistrates. The Court could not amend the conviction and reduce the fine, because the error of the Magistrates was one which affected the substantial merits of the case.

*Publicans' Act,—Sly Grog Selling.—13 Vic., No. 29.—Sutton v. King and another, June 17, 1854.*

On motion to make absolute a rule *nisi* for a prohibition to restrain two of the Magistrates at Oakeville Creek, Hanging Rock, from proceeding further under a summary conviction of the applicant, a preliminary objection was taken that the applicant was out of time. The conviction took place on the 12th April, and the rule was not obtained till the 13th May; but, by 14 Vic., No. 43, s. 12, the time for such applications was limited to 20 days, unless the place was more than 100 miles distant, and there was no affidavit to show that this place was beyond that distance.

The Court sustained this objection; and it then became a question whether leave should be granted to file a supplemental affidavit to show that, as the place was really nearly 300 miles distant, the application would be in time even within sixty days. Their HONORS ruled that an affidavit might be received to supplement the materials on which a rule *nisi* had been granted, provided that it went wholly to the cure of some technical defect or palpable omission, as in the present instance, and in no way affected the merits of the case. The case was then gone on with, subject to the filing of this supplement. The conviction was one under the Publicans' Act for "sly grog selling," and the main point relied on was, that there was no evidence of "exposure" of spirits to warrant this conviction. A large quantity of spirits was found partially concealed in an inner apartment in the applicant's store-tent. There was evidence that Mrs. Sutton had supplied spirits and taken money, but no proof of the husband's cognizance. The latter admitted that he had given spirits to his customers, but denied that he had sold any. It appeared that an information filed against Sutton for selling spirits had been dismissed, in consequence of a wrong kind of spirits being named.

Their HONORS sustained the application. There was no sufficient evidence to sustain a conviction on the exposure of spirits presumed on sale, with the knowledge and participation of the applicant. The conviction, therefore, (subject to the production of the supplemental affidavit), must be quashed. In announcing this decision, however, Sir A. STEPHEN drew attention to the necessity for a vigilant and careful exercise of the magisterial functions, for the purpose of staying the progress of this most

dangerous and brutalizing practice of sly grog selling. If, in fact, this Mrs. Sutton had really sold spirits, there was no reason why she should not have been prosecuted to conviction. There was no reason even why she should not be thus prosecuted still. If the prior information was really dismissed because a wrong kind of spirits had been named, this was an objection which ought not to have been sustained, and which certainly would not have been sustained if taken into the Supreme Court. But, whatever was the occasion of this dismissal, if the point was a technical one, it would not prevent the filing of a new information, for there had been no acquittal. Again, if it were true that this applicant himself was in the habit of giving spirits to those who made purchases at his store, this was a clear evasion of the law, and, on proof of it, would warrant his conviction. The Magistrates had the power vested in them of deciding what would amount to a sale of spirits, and it was their duty to see that no such sales were permitted, however carefully they might be cloaked. Now, to supply spirits to those who made purchases of other goods from the storekeeper, was merely a sale under another form so as to evade the law, for it was clear that the spirits were supplied for a valuable consideration; and, if there was tangible proof that the present applicant had done this, there was no reason why he should not still be convicted.

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*Publicans' Act,—Evidence of being Servant.—13 Vic., No. 29, s. 35.—Ex Parte Ward. (Prohibition).*

The CHIEF JUSTICE delivered the judgment of the Court in these cases (there being two), as follows:—

This was a rule *nisi* for a prohibition under the Justices' Acts of 1850 and 1853, to try the validity of a conviction of the applicant by two Justices, under sec. 55 of the Publicans' Act, for *employing an unlicensed person*, named Maddy, to sell liquor in his (Ward's) licensed house,—the said Maddy not being Ward's agent or servant, under his immediate superintendence and control.

The case, as established by the oral testimony and by certain statements of Ward himself, (made in an affidavit used by him on another occasion), was as follows. Ward had made over all his interest in the house, together with the furniture and stock, to the said Maddy. But, as the latter could not obtain immediately a transfer of the license, it was arranged that he should (ostensibly, at least) act in the meantime as Ward's barman. An agreement was accordingly entered into between them in due form, with all the appearances of reality, whereby Maddy undertook to serve during the necessary interval in that capacity, and as clerk, at a salary of 5s. a day. In pursuance of this arrangement or contrivance, Maddy sold liquors afterwards repeatedly at the bar, Ward himself, however, occasionally being present. But, in addition to the fact of Ward's assignment, and his disclaimer of all interest in the goods by affidavit, (to defeat an execution under which they had been levied on by a creditor), and the fact that Maddy was the assignee, it was proved that this supposed barman was a person of property, whose position repudiated the idea of his having in truth accepted such an employment. The Magistrates, therefore, very reasonably held the arrangement to be a mere contrivance; and, conse-

quently, that Maddy was not Ward's agent or servant, but was really himself the owner,—Ward, the party licensed, having virtually ceased to have any interest as such.

The question is, however, whether the case falls within the 55th section ; for, in such a state of things, how can the actual owner be said to have been "*employed*" to sell ? We are all of opinion that in no true or proper sense was Maddy so employed. The asserted employment being a pretence, and Maddy himself, not Ward, being the owner, it seems to us a palpable inconsistency to maintain that, nevertheless, for the purposes of a conviction, an employment existed. The prohibition, therefore, as to this particular case, we conceive, must clearly be granted.

A second rule *nisi* has been obtained at the instance of the same defendant in respect of his conviction, on precisely the same evidence, under sec. 49, of having *permitted Maddy to conduct the business*.

It was not disputed that (supposing the conclusion as to the facts to be correct) the offence contemplated by the 49th section, of "permitting an unlicensed person to become virtually the keeper" of a licensed house, was complete. Objections were taken, however, of a less substantial character, which we are now to dispose of.

The first is, that the original of Ward's affidavit, although in existence and accessible, was not produced in evidence, but a copy only. It appears, however, that he made no objection to the receipt of that copy, although questions were certainly asked by him as to the existence of the original. We think, therefore, that the objection is now too late. A proceeding in itself a *nullity* indeed, or illegal in its character, may be impeached, notwithstanding a previous waiver ; but the wrong reception of the copy of a document instead of the original, if the contents of the document, supposing the original had been produced or shown to have been lost, were admissible, was, in our opinion, an irregularity only, of which a defendant, if he does not object to it at the time, cannot afterwards take advantage.

The second objection is, that, instead of calling Maddy as a witness, and thereby affording Ward the benefit of a cross-examination, the prosecutor was allowed to give in evidence, in addition to Ward's own affidavit, the copy of one formerly made by Maddy. This proceeding, certainly, if an irregularity only, was an irregularity of the gravest character ; for, supposing even the original to have been produced, (and considering all objections to the mere *copy* as *waived*), the contents were clearly inadmissible, on the plainest and most elementary principles. A man's own statement, of course, whether on oath or not, and whether written or verbal, voluntarily made, is evidence against him ; but, obviously, all other testimony affecting him on a criminal charge must be on oath, and given not only in his hearing, but in direct reference to that charge, and before the tribunal which tries him on it. Maddy's affidavit, indeed, might possibly have been evidence as a document used by Ward, (and therefore in effect as a statement made by himself), had it been proved that Ward had so used it. No such proof, however, was offered.

Our conclusion on this part of the case is, that no waiver by Ward (short of a positive assent) could deprive him of the right of objecting that the affidavit now in question was wrongly received. If, therefore, the other evidence before the Justices had not been itself sufficient in this

second case (rejecting Maddy's affidavit) to convict the defendant of the offence, he would now be entitled to our judgment. But the evidence without that affidavit is amply sufficient to sustain their adjudication. And we entertain no doubt, having regard to the enactments which have given this remedy by prohibition, that it is our duty, before holding any conviction by a Magistrate to be erroneous, to look at and consider the whole of the evidence which was before him. In cases tried by a Jury, the Court has ordinarily no jurisdiction to determine facts. If improper evidence be admitted on a trial, therefore, the course is to set aside the verdict; for it may have been founded, whatever the force of other testimony in the case, on the very matter which ought not to have been before the Jury. In cases of this kind, however, the Court sits in effect as a tribunal of appeal, with the double province assigned it, of deciding on the facts as well as the law; and it seems to us to follow that if, after rejecting all improper evidence, and giving due effect to every other legal objection, if any, enough remains which is unobjectionable, the conviction must be sustained.

In *Ex parte Beades*, (in this Court, 22nd September, 1853), two objections were made: First, That there was no previous information or charge; and, secondly, That the prosecutor was examined as a witness. Neither objection was taken before the Justices. The Court held that the first objection was thereby waived, but that the second was not, the testimony of the prosecutor in the particular case being inadmissible under any circumstances. So, in *Ex parte Klensendorff*, 15th June, 1853, where the copy (instead of the original) of a previous conviction had been put in evidence without objection, the Court inclined to think that the defendant could not object afterwards. But we held that he was not precluded from objecting, though he had omitted to take the point before the Justices, that the evidence was offered to prove an offence beyond that with which he was charged. In *Ex parte Solomons*, 13th July, 1854, one of the objections was, that the conviction was chiefly founded on hearsay evidence. None of it, however, appeared to have been objected to before the Magistrates, and the Court thought, therefore, that its reception was no ground for a prohibition. But the question was not entered into, whether, nevertheless, the conviction could have been sustained, had no sufficient evidence been given irrespective of the hearsay?—the writ being granted eventually, on the ground that the conviction disclosed no offence. The result as to the second rule *nisi* here is, that the prohibition is refused with costs, as the merits are wholly against the applicant.

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*Vagrant Act*,—*Larceny*.—15 Vic., No. 4.—*Ex Parte Landregan*, March 19, 1853.

The CHIEF JUSTICE delivered judgment in this case:—

This was a motion for a prohibition (under the Justices' Acts of 1850 and 1853), to restrain further proceedings on a conviction of the applicant before two Justices, under sec. 3 of the Vagrant Act, (*Call.*, 2542), for an indecent exposure of his person.

The offence is, as defined in the Statute, "wilfully and obscenely exposing his person in any street, road, or public highway, or in the view



*thereof.*" The conviction is, that the party so exposed his person *in the view of* a public street, called Parramatta Street. The alleged exposure was, in fact, in a paddock and at night, and was seen from some adjoining premises, but not (so far as is known) from any public street. It was, however, *visible* from Parramatta Street, had any person been passing there at the time, and looking in the direction of the paddock. The question is, whether the exposure can be deemed within the enactment under such circumstances?

Mr. JUSTICE THERRY and myself (who heard the arguments) are of opinion that the conviction was right. The object of the enactment evidently was, we think, to punish obscene exposure either in a street, or visible to passers-by (if any) in the street. Such is the only intelligible meaning which can be attributed to the words "in the view" of a street. Had the Legislature intended, as an essential to the offence, that passers in the street should actually see the exposure, very different language, assuredly, would have been used. By prohibiting every obscene exposure, which, if there were persons in the street, would or might be seen by them, public decency was effectually secured. The rule for the prohibition is accordingly refused, with costs to be paid by the applicant.

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*Vagrant.*—15 Vic., No. 5.—*Ex Parte Haywood*, March 28, 1859.  
(*Bathurst Circuit*).

A motion for the reversal of a decision committing appellant to twelve months' imprisonment under the Vagrant Act, 15 Vic., No. 5, s. 3, founded on two objections:—1st, That the conviction did not specify the particular purpose entertained (or supposed to have been entertained) by the appellant; and, 2nd, That nothing in the case showed any unlawful purpose within the meaning of the enactment.

His HONOR the CHIEF JUSTICE delivered judgment as follows:—

The appellant has been convicted by two Justices of having been at night in the kitchen of a Gold Commissioner "for an unlawful purpose," not specified, for which offence, real or asserted, he was sentenced to a serious term of imprisonment with hard labour; and two objections are taken to this conviction (*as above stated*). The evidence discloses only that the appellant is Sergeant of the Gold Escort, and lives near the Commissioner's residence, in a room adjoining the kitchen, of which, on one side, slept ordinarily a female servant, and in a room on the other slept one of the witnesses in the case, who, it seems, for certain reasons, suspecting that the sergeant would come to the kitchen on the night in question, lay awake on the watch with another man, and there is no doubt on my mind, from their testimony, that the appellant came as anticipated, was let into or obtained access to the kitchen, was there for some purpose with the woman, and in about two hours, then a little past midnight, departed to his quarters.

It was stated in the argument of the case before me that the Commissioner's residence was, in fact, the place of deposit of large quantities of gold. The circumstance, however, is not mentioned in the evidence; but had it been so, the fact would, in my opinion, have no value in considering the question for decision; for it appears to me most clearly that

in truth no suspicion was entertained that the sergeant had designs on the gold; and, had that suspicion been in fact entertained, I should feel no difficulty in saying that nothing in the circumstances justified it. The very absence of the statement, and even of any allusion to the fact, in the evidence, confirms my inference, that the suspicion was of a very different character. It evidently was, that this man entered the Commissioner's premises and remained there for purposes of immoral intercourse with the woman servant. Is such a purpose an "unlawful" one within the meaning of the enactment? I cannot persuade myself that it is. The Act was passed, as the preamble shows, for "the prevention of vagrancy and crime, and the punishment of idle and disorderly persons, rogues, and vagabonds." It embraces, therefore, a great number of matters specified, the existence of which will constitute a person one of those two classes, that is to say, either an idle and disorderly person, or a rogue and vagabond.

The particular matter or thing done does not of itself, so to speak, subject the party to punishment; but it makes him, or he is (in other words) by reason of that thing declared to be a person idle and disorderly, or a vagabond and rogue, and therefore subjected to punishment. Thus every person wandering abroad to gather alms in public, or behaving indecently in public, under certain circumstances, or holding any house frequented by reputed thieves, is, by sect. 2, "deemed an idle and disorderly person," liable to two years' imprisonment with hard labour; and every person playing or betting at any unlawful game, or having on him any implement with intent to commit a felony, or being found in any dwelling or outhouse, or in any vessel, for any unlawful purpose, is, by sect. 3, deemed "a rogue and vagabond," liable to the same punishment. By the following section persons doing certain other things are deemed "incorrigible rogues." These, by a blunder in the Statute, are subjected to a less punishment than persons who are rogues simply; but in each case it will be seen that the party is classed under some one of these heads, and is punishable accordingly; and so, in the Forms given in Burns's Justice, I observe that every conviction under the English Act, with which our own substantially agrees as to this point, is framed. I pass by for the present, however, all objections to the conviction in respect of form. Let it be assumed, therefore, that the appellant stands convicted of having been found in the kitchen, having then and there the purpose in fact imputed to him, and of being for that reason a rogue and vagabond within the intent and meaning of the Statute,—could such a conviction be supported? I am of opinion in the negative. However scandalous the purpose, and whatever its aggravations under the circumstances, I do not think the law contemplated or includes cases of that kind. I reject the idea of meditated rape, and equally that of an assault with intent to commit one. Each of these, if committed, would, of course, have been an unlawful act. But on the evidence before the Magistrates there is no pretence for the suggestion of either purpose. The case which remains, then, is that of the immorality; but committed—or to be committed—with the female's consent. Such an act, however, if, in the proper sense, unlawful at all, (by which I mean an act cognizable and punishable by law), is not, in my opinion, one in kind or character such as the Statute could have been

designed to embrace when making all who committed it, under all or any circumstances, rogues and vagabonds. But I know of no law in force within this Colony by which fornication or adultery can be prosecuted as an offence. The act here, therefore, if committed, was not unlawful within the true meaning of the term when used in a penal Statute; and if the act itself, when committed, is not punishable, what an anomaly would it be to hold that, nevertheless, it is punishable to be found with the purpose only, as yet unexecuted, of committing the act. Assuming the immoral act to have been by the woman's consent, it will be observed that such act was not even a trespass. The entry on the premises without their owner's consent was so; but that act was past and gone. All which was to follow (that is to say, the execution of the purpose formed) was no more an injury to that owner than if the servant was elsewhere, or than if she were, in fact, the servant of some one else. Every moment of added continuance on those premises, no doubt, was a continuance of the first trespass; but it is not any trespass there, or the being found on any premises, which, separately taken, constitutes the charge. It is the being so found with, at that time, an ulterior unlawful purpose,—some purpose that was unlawful, and over and above the trespass. The word "found" is therefore material in the consideration of the question. He who has committed an unlawful act, it may be concluded, is punishable for the act; but he who merely meditates and intends it, having as yet done nothing initiatory of the act, is liable to no punishment; and, if disturbed at that stage, or, abandoning his purpose, he retires, he naturally will remain unpunished. The law seems to have been passed to reach a third stage of things,—where a man is found on premises under circumstances indicating the existence at that time of an unlawful purpose, and, therefore, a purpose neither abandoned nor accomplished. Here, however, the party was never so found, but had quitted the premises, and, consequently, the purpose existed then no longer. For the reasons thus given, I am of opinion that the conviction in this case was wrong, and I therefore direct the appellant to be discharged. The conclusion formed by me, being on the substantial objection, renders it unnecessary to consider that which is taken to the conviction in point of form. I recommend Magistrates, until that question be determined, to specify the supposed unlawful purpose meditated, in all adjudications under this enactment; for the general rule of law undoubtedly is, that such matters should be stated as will enable the superior Court, on revising the decision complained of, to see that an offence has been, at least, adjudged. But how can any Court determine that purpose to be unlawful which is not stated? and where not stated, it is possible that its nature may never even have been considered by those who yet had to adjudicate that it was unlawful.

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## APPENDIX.

*Habeas Corpus; Bastard; Colonial Justices' Acts.—In Re A. B.*  
November, 2, 1860.

This was an application by *habeas corpus* for the discharge of A. B., who was convicted by the Justices for disobedience of a bastardy order, and

committed. The counsel for A. B. was heard on the 29th October, and, after the commencement of the address in support of the commitment, the Court was adjourned. On the re opening of the Court, complainant's counsel sought to get in by affidavit a formal record of the order wherein defects pointed out on the previous argument were apparently remedied. The Court held, after argument, that this could not be done at that stage of the case, but permitted, under s. 19 of the Common Law Procedure Act of 1857, witnesses to be examined on oath to prove the document in question. This conviction was dated 29th October, although only signed within the previous 24 hours. The document was admitted. (*Per Curiam*): "The formal record can be drawn up at any time," (*in re Cross*, 26 L. J. M. C., 103).

This record set out the disobedience by applicant of the order to pay £1 per week to "Inspector Singleton, or other Inspector of his district," for the support of his child, and his conviction and committal for this disobedience. It was not averred in the order that this *child had been deserted*; therefore the order was held to be bad. It was urged, however, that the conviction was one for disobedience to an order, and the disobedience being shown, no question as to the order itself could be opened; that the conviction was not bad for uncertainty, on account of its direction to Singleton or, &c.; that the Court, being satisfied *on the evidence*, would amend; that, although the power of amendment conferred by s. 9 of 14 Vic., No. 43, was to be according to discretion, the direction to correct an omission under s. 10 of 17 Vic., No. 39, was imperative.

Sir JOHN DICKINSON, C. J.: The order is bad for want of the averment for desertion, unless we amend; we must, therefore, consider the two Justices' Acts of 1850 and 1853; I do not think that s. 10 of 17 Vic., No. 39, qualifies the powers of amendment given by s. 9 of 14 Vic., No. 43, in cases of *habeas corpus*; if, therefore, we find facts on the depositions to support the Justices' adjudication, we ought to use our powers of amendment; but, as the amendment is to supply an allegation in the order, we can only amend where *such facts* (*i. e.* the facts in the depositions) prove to us the omitted fact; that is, we must pronounce an affirmative judgment on the matter. Now, I do not say the Justices are wrong, but I am not so affirmatively satisfied as to exercise my power of amendment, and thus deprive the applicant of his Common Law right of discharge.

MILFORD, J.: The two Acts are to be read together; s. 9 of 14 Vic., No. 43, applies especially to cases on *habeas corpus*; 17 Vic., No. 39, does not repeal it; but s. 10 of the latter does not appear to me to apply to *habeas corpus*.

WISE, J.: These objections do not apply to jurisdiction; the order is bad; are we to take away the applicant's liberty by exercising our statutory power of amendment? 14 Vic., No. 43, gives us this power on review of facts in the way of appeal. S. 9 enables us to cure technical objections according to *our discretion*, and thereby a *right* is conferred on the prisoner that the Court should be satisfied that the conviction is right before amending. He is entitled to have our positive opinion. Does 17 Vic., No. 39, take away this right? By this Act, s. 12 of 14 Vic., No. 4, is extended. I am not satisfied that s. 10 of 17 Vic., No. 39, applies to *habeas corpus*. We must decline to amend, because we can't feel ourselves so affirmatively satisfied as to take away the right possessed by prisoner.

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See "Adulteration" means that reference is to be made to that head in the body of the book. See "Adulteration" refers to that heading in the Index.

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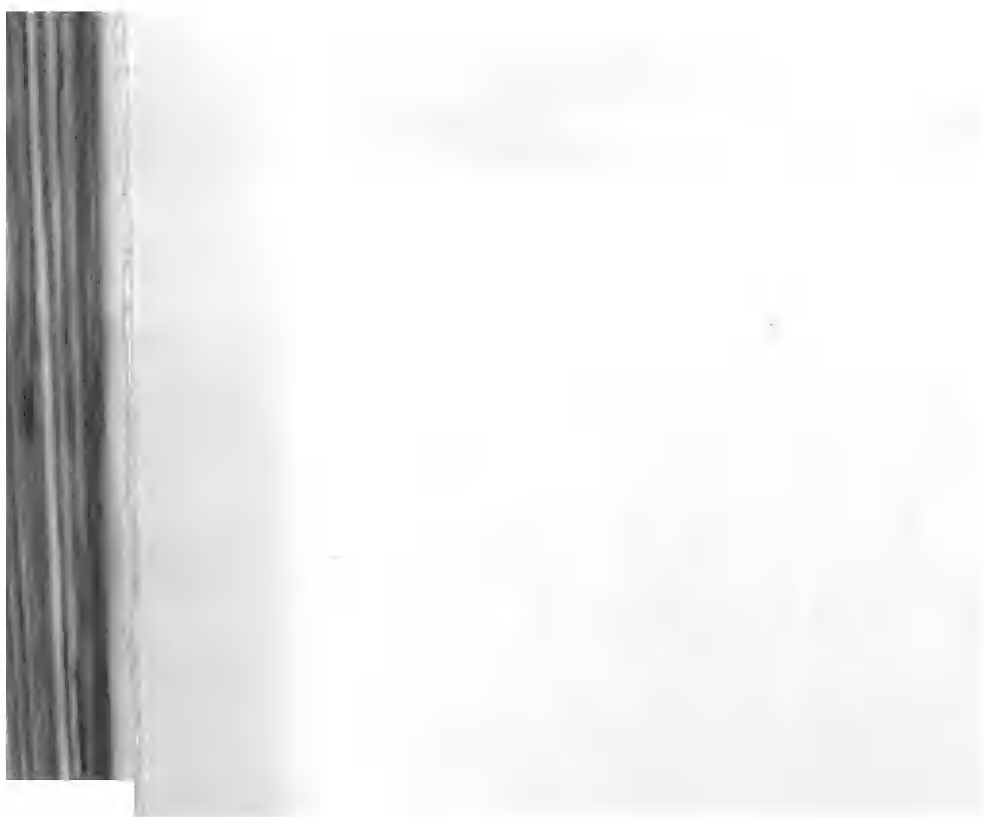
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